

0001

1 MONDAY, JANUARY 11, 1999 9:35 A.M.
2 (THE FOLLOWING PROCEEDINGS WERE HELD IN
3 CHAMBERS, OUTSIDE THE PRESENCE OF THE JURY)
4 THE COURT: WE'RE ON THE RECORD IN CHAMBERS. MY
5 CLERK, MS. VERA MU, HAS ADVISED ME THAT JUROR NO. 2, MR.
6 BECKWITH, HAS ASKED TO SPEAK TO THE COURT. DO WE HAVE A
7 STIPULATION THAT WE SHOULD CALL IN MR. BECKWITH AND SEE
8 WHAT'S ON HIS MIND?
9 MS. CHABER: YES.
10 THE COURT: COUNSEL?
11 MR. OHLEMEYER: OH, I'M SORRY. SO STIPULATED.
12 THE COURT: WE'LL DO THAT.
13 (DISCUSSION OFF THE RECORD)
14 (MR. BECKWITH ENTERS THE CHAMBERS AREA)
15 THE COURT: WE'RE ON THE RECORD IN CHAMBERS WITH
16 MR. BECKWITH. YOU WANTED TO MEET WITH ME?
17 JUROR NO. 2: YEAH. I'M HAVING REAL PROBLEMS AT
18 WORK. I WAS -- THE ONLY REASON I SAID IT WOULDN'T BE A
19 HARDSHIP TO ME WAS BECAUSE THEY TOLD ME THEY WERE GOING TO
20 PAY ME. WELL, NOW THEY HAVE TAKEN MY TRUCK. THEY SAID THEY
21 ARE NOT PAYING ME. THEY SAID: "WE NEVER TOLD YOU WE'D PAY
22 YOU."
23 SO BASICALLY WHAT'S HAPPENING IS I'M GOING INTO
24 MY SAVINGS NOW. AND I CAN SURVIVE FOR AWHILE. BUT YOU'VE
25 GOT TO UNDERSTAND, ON THE OTHER HAND, I DON'T WANT TO GO
26 BACK TO THESE GUYS NOW, AFTER PULLING THIS ON ME. THEY'RE,
27 YOU KNOW, PUTTING A LOT OF STRESS ON ME JUST BY THE CUSTOM
28 AND PRACTICE THEY PULLED.

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0002

1 THE COURT: ARE YOU AN EMPLOYEE OR AN
2 INDEPENDENT CONTRACTOR?
3 JUROR NO. 2: AN EMPLOYEE.
4 THE COURT: WHAT IS THE NAME OF THE
5 ORGANIZATION?
6 JUROR NO. 2: ARGON COMMERCIAL LANDSCAPING.
7 THE COURT: LET ME SUGGEST TO YOU AGAIN, WHY
8 DON'T YOU TELL YOUR SUPERVISOR THAT THE COURT HAS ASKED FOR
9 YOUR SUPERVISOR TO CALL HIM. HAVE HIM SPEAK WITH VERA MU.
10 IF VERA IS NOT ABLE TO SATISFY YOUR EMPLOYER, I WILL TALK TO
11 YOUR EMPLOYER AS WELL.
12 WHY DON'T WE PURSUE THAT AND SEE IF WE CAN'T GET
13 YOU SOME PIECE HERE WITH YOUR EMPLOYER. LET'S TRY THAT AND
14 SEE IF THAT WORKS. WHY DON'T YOU JUST TELL YOUR EMPLOYER
15 THAT I'D LIKE YOUR EMPLOYER TO DO THAT TODAY, IF POSSIBLE,
16 BECAUSE VERA WON'T BE WITH US TOMORROW TATSUO IS COMING
17 BACK. VERA WOULD BE PREPARED TO SPEAK WITH THE EMPLOYER
18 TODAY.
19 VERA WILL TELL ME ABOUT THAT CONVERSATION. AND
20 IF I THINK IT'S APPROPRIATE, I'LL PURSUE FURTHER
21 CONVERSATION WITH YOUR EMPLOYER. WHY DON'T WE SEE IF WE CAN
22 MAKE IT WORK.
23 JUROR NO. 2: OKAY.
24 THE COURT: OKAY?
25 JUROR NO. 2: NO PROBLEM.
26 THE COURT: OKAY. THANK YOU VERY MUCH.
27 JUROR NO. 2: THANKS.
28 (MR. BECKWITH LEFT THE CHAMBERS AREA)
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0003

1 THE COURT: THE RECORD SHOULD REFLECT THAT MR.
2 BECKWITH HAS LEFT. ARE BOTH COUNSEL SATISFIED WITH THE WAY

3 THIS IS BEING HANDLED AT LEAST UP TO THIS POINT?

4 MS. CHABER: YES. MY SUGGESTION WOULD BE IF MS.
5 MOORE HASN'T ARRIVED YET, THAT HE GO AND MAKE A PHONE CALL
6 NOW SO WE CAN GET THIS ISSUE RESOLVED SOONER RATHER THAN
7 LATER.

8 THE COURT: ARE YOU SATISFIED?

9 MR. OHLEMEYER: I'M SATISFIED, YOUR HONOR.

10 THE COURT: ALL RIGHT. WE CAN GO OFF THE RECORD
11 (THE FOLLOWING PROCEEDINGS WERE HELD IN THE
12 COURTROOM, IN THE PRESENCE OF THE JURY, AT
13 9:55 A.M.)

14 THE COURT: GOOD MORNING, JURORS. JUST A COUPLE
15 OF THINGS THAT I NEED TO TAKE UP WITH YOU BEFORE WE PROCEED
16 WITH MORE EVIDENCE TODAY. ONE IS -- AND I UNDERSTAND AGAIN
17 THIS IS CIRCUMSTANCES BEYOND ANYBODY'S CONTROL -- BUT WE'VE
18 GOT TO GET INTO THE PATTERN AND PRACTICE IN THIS CASE OF
19 STARTING AT THE APPOINTED HOUR.

20 IF I'M GOING TO BE STARTING A HALF HOUR OR AN
21 HOUR LATE, EVEN 15 MINUTES LATE ON A REGULAR BASIS, I'M NOT
22 GOING TO GET THIS CASE TRIED IN THE AMOUNT OF TIME THAT I
23 ESTIMATED TO YOU. I THINK WE ALL OWE IT TO ONE ANOTHER THAT
24 WE HAVE GOT TO LEAVE HOME IN ENOUGH TIME SO THAT IF THE
25 BUSES DON'T WORK WELL, THAT WE'RE STILL HERE ON TIME. WE
26 HAVE GOT TO PLAN AGAINST A CERTAIN AMOUNT OF INEFFICIENCY IN
27 OUR LIFE, BECAUSE WE ALL FACE IT.

28 SO I'M NOT SAYING THIS IN ANY WAY, SHAPE OR FORM
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0004

1 TO CHASTISE ANY OF YOU. YOU'RE ALL PERFORMING A VERY
2 IMPORTANT PUBLIC SERVICE HERE AND WE ALL APPRECIATE YOUR
3 EFFORTS. BUT ALL I'M SAYING IS IF WE'RE GOING TO RUN THIS
4 TRIAL IN AN EFFICIENT WAY, WE'RE GOING TO HAVE TO BE HERE
5 AND FAITHFUL TO THE APPOINTED HOURS, BECAUSE OTHERWISE THE
6 DAYS AREN'T GOING TO GOING TO BE LONG ENOUGH TO GET THIS
7 CASE IN. IT ISN'T FAIR TO THOSE WHO ARE HERE ON TIME THAT
8 ANYBODY SHOULD HAVE TO WAIT FOR SOMEBODY WHO IS LATE.

9 THE TWO CIRCUMSTANCES THAT WE HAVE HAD SO FAR
10 WERE BOTH CIRCUMSTANCES BEYOND ANYBODY'S CONTROL AND I'M NOT
11 ASSESSING ANY BLAME FOR WHAT HAS HAPPENED UP TO NOW. WHAT
12 I'M TRYING TO DO IS JUST EMPHASIZE THE IMPORTANCE OF OUR
13 BEING ON TIME. WE NEED TO DO IT OUT OF RESPECT AND
14 CONSIDERATION FOR ONE ANOTHER AND FOR EFFICIENCY IN RUNNING
15 THIS TRIAL. IT ISN'T FAIR TO ANYBODY IF WE ALL HAVE TO KEEP
16 WAITING. SO PLEASE, LET'S ALL MAKE A BIG EFFORT TO DO
17 THAT.

18 NOW, YOU'LL NOTICE THAT -- NOW I'M TURNING TO
19 ANOTHER SUBJECT. MR. ZAMANI IS NOT HERE. AND I HAVE
20 EXCUSED MR. ZAMANI. AND MR. ZAMANI HAS GIVEN ME PERMISSION
21 TO EXPLAIN TO YOU THE CIRCUMSTANCES UNDER WHICH I'VE LET HIM
22 GO, BECAUSE I DON'T WANT TO GET THE MESSAGE OUT THAT I'M
23 GOING TO LET PEOPLE OFF OF THIS JURY. ONCE YOU START, YOU
24 ARE REQUIRED TO FULFILL YOUR COMMITMENT ON THIS JURY. AND
25 WE CANNOT AFFORD TO LOSE ANY MORE OF OUR JURORS.

26 THE REASON THAT MR. ZAMANI IS NOT WITH US -- AND
27 AS I SAY, HE HAS GIVEN ME PERMISSION TO TELL YOU -- IS A
28 HEALTH REASON. HE DEVELOPED A HEALTH PROBLEM THAT COULD NOT
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0005

1 REASONABLY HAVE BEEN ANTICIPATED AT THE TIME HE COMMITTED TO
2 THE JURY SERVICE. AND THAT HEALTH PROBLEM MADE IT
3 IMPOSSIBLE FOR HIM TO BE A JUROR WITH US IN THIS CASE. SO
4 THAT WAS A CIRCUMSTANCE THAT WAS VERY UNUSUAL AND BEYOND
5 ANYBODY'S CONTROL.

6 AND THE REASON THAT HE'S AUTHORIZED ME TO TELL
7 YOU THAT, AS I SAY, IS SO THAT OTHER PEOPLE WON'T THINK THAT
8 I'M GOING TO BE LETTING OTHER PEOPLE OFF OF THIS JURY. I'VE
9 GOT TO HOLD THIS JURY TOGETHER. ONCE YOU SIGN UP FOR JURY
10 SERVICE, YOU HAVE TO SEE IT THROUGH. THAT WAS JUST A VERY,
11 VERY UNUSUAL, UNFORTUNATE CIRCUMSTANCE.

12 IT'S NOT ANYTHING SERIOUS. MR. ZAMANI IS GOING
13 TO BE FINE. I DON'T WANT YOU TO WORRY ABOUT HIM. THAT WAS
14 A CIRCUMSTANCE THAT MADE IT IMPOSSIBLE FOR US TO KEEP HIM
15 WITH US. I WANT YOU ALL TO TAKE VERY GOOD CARE OF
16 YOURSELVES. I CANNOT ALLOW OTHER PEOPLE TO LEAVE US. I
17 HAVE GOT TO BE SURE WE HAVE ENOUGH JURORS TO COMPLETE THIS
18 CASE.

19 ALL RIGHT. AND I'M GOING TO ASK VERA --
20 REMEMBER, WE DO A RANDOM SELECTION AMONG OUR ALTERNATES. SO
21 I'M GOING TO ASK VERA TO PICK A NAME OUT OF A HAT, THE NAME
22 OF ONE ALTERNATE WHO IS THEN GOING TO TAKE SEAT NO. 10 FOR
23 THE REMAINDER OF THE TRIAL.

24 THE CLERK: MARIA D. SALINAS, S-A-L-I-N-A-S.
25 MARIA D. SALINAS FOR SEAT NO. 10.

26 THE COURT: NOW, LET ME JUST ASK MR. VACCARO,
27 YOU WOULD RATHER SIT WHERE YOU ARE, I TAKE IT, RATHER THAN
28 IN MS. SALINAS' VACATED SEAT?

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1 ALTERNATE JUROR NO. 15: THIS IS FINE.

2 THE COURT: AND MR. LOUDIS, THE SAME QUESTION TO
3 YOU. WHICH SEAT WOULD YOU PREFER?

4 JUROR NO. 11: I PREFER THIS ONE. THANK YOU.

5 THE COURT: OKAY. THEN WE'RE ALL SET. THEN I
6 THINK WE'RE READY TO RESUME OUR EVIDENCE. AND MS. CHABER,
7 YOU MAY CALL YOUR NEXT WITNESS.

8 MS. CHABER: YES, YOUR HONOR. BEFORE I DO THAT,
9 I WANTED TO CLARIFY FOR THE RECORD THAT FOR CONVENIENCE
10 PURPOSES THERE HAS BEEN A CHANGE OF CERTAIN DOCUMENT NUMBERS
11 THAT HAD BEEN REFERRED TO ON FRIDAY, AND THAT IS THAT
12 DOCUMENT 19 IS NOW DOCUMENT 21, DOCUMENT 20 IS NOW 22,
13 DOCUMENT 21 IS NOW 23 AND DOCUMENT 22 IS --

14 THE CLERK: NO.

15 THE COURT: ISN'T THAT RIGHT VERA?

16 THE CLERK: I THINK 19 NEEDS TO BE 23.

17 THE COURT: OH, OKAY.

18 MS. CHABER: OH. RIGHT.

19 THE CLERK: WHY DON'T I DO IT. 19 NOW WILL BE
20 23, 20 WILL BE 24, 21 WILL BE 25 AND 22 WILL BE 26.

21 THE COURT: AND 26 IS IN EVIDENCE. THE OTHER
22 THREE ARE NOT. IS THAT STIPULATED BY BOTH OF YOU, THAT WE
23 SHOULD MAKE THOSE CHANGES?

24 MR. OHLEMEYER: SO STIPULATED, YOUR HONOR.

25 MS. CHABER: YES. AND JUST SO THAT IT'S NOT
26 CONFUSING, THERE WILL BE OTHER DOCUMENTS THAT WILL BE CALLED
27 19, 20, 21 AND 22. SO THERE WILL BE DOCUMENTS THAT HAVE
28 THOSE NUMBERS. BUT THE ONES THAT WERE INTRODUCED ON FRIDAY
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0007

1 ARE THE ONES THAT HAVE BEEN CHANGED.

2 THE COURT: FOR THE JURY'S SAKE, I THINK IT'S
3 CLEAR ENOUGH. WE HAVE INCREASED THE NUMBERS BY FOUR FOR
4 EACH OF THE EXHIBITS THAT WERE IDENTIFIED ON FRIDAY, AND THE
5 FIRST THREE ARE NOT IN EVIDENCE BUT THE FOURTH IS. SO THE
6 OLD 22 IS NOW 26 AND THAT IS IN EVIDENCE.

7 OKAY. NOW I THINK WE'RE READY FOR OUR NEXT
8 WITNESS.

9 MS. CHABER: THANK YOU, YOUR HONOR. AT THIS
10 TIME, THE PLAINTIFF WOULD CALL DR. RICHARD POLLAY TO THE
11 STAND.

12 TESTIMONY OF
13 RICHARD WARREN POLLAY,
14 A WITNESS CALLED ON BEHALF OF THE PLAINTIFF, HAVING BEEN
15 DULY SWORN, TESTIFIED AS FOLLOWS:

16 THE CLERK: PLEASE STATE YOUR NAME FOR THE
17 RECORD.

18 THE WITNESS: RICHARD WARREN POLLAY,
19 P-O-L-L-A-Y.

20 THE CLERK: THANK YOU.

21
22 DIRECT EXAMINATION
23 BY MS. CHABER: Q. GOOD MORNING, DR. POLLAY.
24 A. GOOD MORNING.
25 Q. ARE YOU A MEDICAL DOCTOR?
26 A. NO, I'M NOT. I'M A PROFESSOR IN THE SCHOOL OF
27 BUSINESS.
28 Q. AND CAN YOU EXPLAIN WHAT YOUR PRESENT POSITION
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0008
1 IS.
2 A. YES. I TEACH MARKETING AND ADVERTISING IN THE
3 FACULTY OF COMMERCE AT THE UNIVERSITY OF BRITISH COLUMBIA.
4 Q. AND WERE YOU BORN IN THE UNITED STATES?
5 A. I WAS. I WAS BORN IN NEW BRITAIN, CONNECTICUT IN
6 1940.
7 Q. AND DID YOU DO YOUR SCHOOLING IN THE UNITED
8 STATES?
9 A. I DID. I DID BOTH A BACHELOR'S DEGREE, MY
10 MASTER'S OF BUSINESS ADMINISTRATION AND MY PH.D. IN CONSUMER
11 BEHAVIOR ALL IN THE UNITED STATES, THE TWO GRADUATE DEGREES
12 AT THE UNIVERSITY OF CHICAGO.

13 MS. CHABER: I'D LIKE TO HAVE MARKED FOR
14 IDENTIFICATION -- AND I GUESS WE'D BE STARTING WITH THE
15 NUMBER SUBSEQUENT -- THE CURRICULUM VITAE OF DR. POLLAY.

16 THE COURT: 27.
17 MS. CHABER: YES.
18 THE CLERK: PLAINTIFF'S EXHIBIT 27 FOR
19 IDENTIFICATION.

20 (DOCUMENT MORE PARTICULARLY
21 DESCRIBED IN THE INDEX MARKED
22 FOR IDENTIFICATION PLAINTIFF'S
23 EXHIBIT # 27)
24 MS. CHABER: THE SECOND COPY IS FOR THE JUDGE.
25 I BROUGHT YOU A BIGGER BINDER. DO YOU WANT IT
26 RIGHT NOW, YOUR HONOR?
27 THE COURT: DURING THE RECESS.
28 MS. CHABER: Q. DR. POLLAY, I'M HANDING YOU
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0009
1 WHAT'S BEEN MARKED AS PLAINTIFF'S EXHIBIT 27. IS THAT YOUR
2 RESUME, IN ESSENCE?
3 A. YES, IT IS.
4 Q. AND IS IT TRUE AND CORRECT?
5 A. YES, IT IS.
6 Q. AND IS IT CURRENT?
7 A. IT'S CURRENT AS OF FEBRUARY OF LAST YEAR, 1998.
8 Q. OKAY. AND HAVE YOU CONTINUED TO ADD TO THIS
9 RESUME IN TERMS OF --
10 A. YES. I HAVE CONTINUED TO BE ACTIVE
11 PROFESSIONALLY DOING PUBLISHING AND TEACHING AND VARIOUS

12 APPEARANCES IN COURT, LIKE THIS ONE.
13 Q. NOW, ARE YOU A CITIZEN OF THE UNITED STATES?
14 A. YES, I AM.
15 Q. AND ARE YOU A CITIZEN OF CANADA AS WELL?
16 A. YES, I AM.
17 Q. WITHIN THE FIELD THAT YOU DEAL WITH, DO YOU DEAL
18 WITH THE ADVERTISING AND MARKETING OF CIGARETTES?
19 A. YES. MY GENERAL AREA IS MARKETING AND MARKETING
20 IS A DOMAIN THAT INCLUDES ADVERTISING, PACKAGING, PRICING,
21 PRODUCT DESIGN AND DEVELOPMENT AND ALL OF THE MARKET
22 RESEARCH ACTIVITIES AND CHANNELS OF DISTRIBUTION AND
23 DELIVERY SYSTEMS THAT ARE ASSOCIATED WITH THE COMPLETE
24 MARKETING EFFORT.
25 Q. AND HAVE YOU MADE ANY PARTICULAR EFFORTS TO LOOK
26 AT THOSE ISSUES THAT YOU'VE JUST DESCRIBED WITH RESPECT TO
27 CIGARETTES?
28 A. YES. FOR MORE THAN A DECADE NOW, MY RESEARCH AND
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0010

1 PUBLISHING HAS FOCUSED ALMOST EXCLUSIVELY -- NOT ENTIRELY,
2 BUT ALMOST EXCLUSIVELY ON CIGARETTES AND I HAVE PUBLISHED A
3 LARGE NUMBERS OF PAPERS ON THAT TOPIC.
4 Q. DOES THIS ONLY RELATE TO THE CANADIAN CIGARETTE
5 INDUSTRY?
6 A. NO. IN FACT, THERE'S ONLY A FEW OF THOSE THAT
7 ARE CANADIAN. ALMOST ALL OF IT IS AMERICAN AND THE HISTORY
8 OF THE AMERICAN ACTIVITY.
9 Q. AND CAN YOU GIVE US AN IDEA OF YOUR EDUCATIONAL
10 BACKGROUND.
11 A. MY BACHELOR'S DEGREE WAS IN ENGINEERING IN THE
12 1950S, THE YEAR OF SPUTNIK, AND MANY PEOPLE WERE COUNSELED
13 TO BECOME ENGINEERS. IT DIDN'T REALLY SUIT ME, SO I WENT ON
14 AND TOOK A BUSINESS DEGREE, AN MBA DEGREE FROM THE
15 UNIVERSITY OF CHICAGO.
16 Q. AND JUST SO THAT WE UNDERSTAND, AN MBA IS WHAT?
17 A. IT'S A MASTER'S OF BUSINESS ADMINISTRATION, AND
18 IN MY CASE, MY FOCUS WAS IN THE DOMAIN OF MARKETING. I WENT
19 OUT AND WORKED FOR AWHILE FOR GENERAL ELECTRIC COMPANY AND
20 THEN WENT BACK TO SCHOOL TO DO A PH.D. AND IN THE PH.D.
21 PROGRAM, I FOCUSED ON CONSUMER BEHAVIOR, TAKING COURSES IN
22 PSYCHOLOGY AND SOCIOLOGY IN ORDER TO BETTER UNDERSTAND
23 APPLICATIONS OF PSYCHOLOGY TO CONSUMER BEHAVIOR.
24 Q. HAVE YOU DONE POSTGRADUATE WORK AS WELL?
25 A. I HAVE. I DID A POSTDOCTORAL YEAR AT THE HARVARD
26 BUSINESS SCHOOL ON BUSINESS HISTORY. AFTER WORKING FOR THE
27 BETTER PART OF A DECADE, I HAD BEGUN TO DEVELOP AN INTEREST
28 IN THE HISTORY OF MARKETING AND MARKETING PRACTICES AND
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0011

1 PARTICULARLY THE HISTORY OF ADVERTISING. AND SO I WENT BACK
2 TO HARVARD FOR THE YEAR '82.
3 Q. AS PART OF THAT, DID YOU HAVE TO LEARN HOW TO
4 RESEARCH HISTORICAL DOCUMENTS THAT RELATED TO WHATEVER ISSUE
5 YOU WERE INVOLVED IN?
6 A. YES. THE PEOPLE AT HARVARD ARE THE PREEMINENT
7 SCHOLARS IN BUSINESS HISTORY. THAT'S THE HEADQUARTERS FOR
8 THE BUSINESS HISTORY REVIEW. I HAD THE OPPORTUNITY TO WORK
9 WITH THOSE PEOPLE.
10 Q. AND AT THE PRESENT TIME, YOU TEACH?
11 A. I DO.
12 Q. AND DO YOU TEACH ON AN UNDERGRADUATE LEVEL, A
13 GRADUATE LEVEL OR BOTH?
14 A. BOTH. IN FACT, THERE'S ACTUALLY THREE LEVELS. I

15 TEACH UNDERGRADUATE STUDENTS TAKING A MASTER'S IN BUSINESS
16 ADMINISTRATION AND PH.D. STUDENTS WHO ARE PREPARING FOR
17 CAREERS IN RESEARCH AND SCHOLARLY WORK AND CONSULTING AS
18 WELL.

19 Q. AND HAVE YOU PUBLISHED IN THE AREA OF YOUR
20 SPECIALTIES?

21 A. YES. I'VE PUBLISHED QUITE A GOOD DEAL, BOTH IN
22 THE MARKETING AREA, THAT IS MARKETING, CONSUMER BEHAVIOR,
23 ADVERTISING WHICH IS THE VERY SPECIFIC APPLICATION AREA, AND
24 THEN OTHER MATERIALS IN PSYCHOLOGY JOURNALS, SOME SOCIOLOGY
25 JOURNALS AND RELATED FIELDS.

26 Q. SPEAKING OF JOURNALS, DO YOU DO ANY REVIEWING OF
27 ARTICLES? I THINK WE HAD IT EXPLAINED ON FRIDAY WHAT A PEER
28 REVIEWER IS. DO YOU DO ANY REVIEWING AS A PEER REVIEWER?

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0012

1 A. YES. I REVIEW FOR A LARGE NUMBER OF JOURNALS,
2 SEVERAL ON A REGULAR BASIS. SOME DEPENDING UPON THE
3 MANUSCRIPTS THEY RECEIVE AT THE JOURNAL. THEY ASK ME FOR
4 ASSISTANCE. I ALSO REVIEW GRANT APPLICATIONS THAT ARE
5 RECEIVED BY VARIOUS BODIES.

6 Q. COULD YOU GIVE US AN IDEA OF THE TYPES OR SORT OF
7 THE NAMES OF SOME OF THE JOURNALS?

8 A. THE JOURNALS THAT I REVIEW FOR REGULARLY ARE THE
9 ACADEMIC JOURNALS THAT ARE LEADING IN THE FIELD OF
10 MARKETING, LIKE JOURNAL OF MARKETING, JOURNAL OF
11 ADVERTISING, JOURNAL OF CONSUMER RESEARCH, JOURNAL OF
12 MARKETING AND PUBLIC POLICY.

13 BUT I ALSO HAVE THIS PAST YEAR REVIEWED FOR THE
14 JOURNAL OF APPLIED PSYCHOLOGY, THE JOURNAL OF CONSUMER
15 PSYCHOLOGY AND OTHER MATERIALS COMING FROM MORE OF THE
16 PSYCHOLOGICAL SIDE OF THE HOUSE.

17 Q. AND WHAT IS APPLIED PSYCHOLOGY?

18 A. WELL, AS THE TERM SUGGESTS, IT'S TAKING CONCEPTS
19 THAT ARE KNOWN ABOUT HUMAN BEHAVIOR AND LOOKING AT HOW THOSE
20 PLAY OUT IN A SPECIFIC APPLIED DOMAIN THAT MIGHT BE ON THE
21 JOB, IN TERMS OF EMPLOYMENT PSYCHOLOGY. IN MY CASE, IT'S
22 LOOKING AT CONSUMER PSYCHOLOGY, HOW PEOPLE SHOP, HOW PEOPLE
23 REACT TO ADVERTISING, PACKAGING, THINGS LIKE THAT.

24 Q. AND CAN YOU GIVE US AN IDEA WHAT SOME OF THE
25 RESEARCH TOPICS ARE THAT YOU HAVE BEEN INVOLVED WITH?

26 A. I'VE LOOKED AT A VARIETY OF ASPECTS OF CIGARETTE
27 MARKETING, PACKAGING, THE HISTORY OF TARGETING OF THE YOUNG,
28 THE IMPACT OF ADVERTISING ON THE YOUNG AS COMPARED TO THE

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0013

1 OLD, RETAIL STORE SIGNAGE, SPORTS SPONSORSHIPS AND SIGNAGE
2 IN SPORTS STADIUMS, THE IMPACT OF THAT, WARNINGS, THE EFFECT
3 OF WARNINGS ON BOTH THE PACKAGING AND RETAIL SIGNAGE, RETAIL
4 VENUES. SO QUITE A RANGE OF TOPICS ON CIGARETTE MARKETING
5 ACTIVITIES.

6 Q. HAVE YOU DONE ANY OF THIS PUBLISHING AND RESEARCH
7 FOR THE SURGEON GENERAL'S REPORTS?

8 A. YES. ON THREE SEPARATE OCCASIONS I HAD THE
9 OPPORTUNITY TO WRITE HISTORICAL MATERIALS FOR SURGEON
10 GENERAL'S REPORTS, ONE REVIEWING THE EVIDENCE ABOUT THE
11 TARGETING OF YOUTH, ONE REVIEWING EVIDENCE ABOUT THE
12 MARKETING TOWARD WOMEN, AND ONE REVIEWING EVIDENCE ABOUT
13 MARKETING TOWARD MINORITIES.

14 Q. CAN YOU GIVE US AN IDEA OF THE YEARS OF THOSE
15 SURGEON GENERAL REPORTS?

16 A. THE REPORTS WITH RESPECT TO THE TARGETING OF
17 YOUTH WAS PUBLISHED IN 1994, AND I AUTHORED THE BETTER PART

18 OF CHAPTER 5, WHICH IS THE CHAPTER ON THE ADVERTISING AND
19 MARKETING ACTIVITIES. THE MATERIAL I PROVIDED FOR THE
20 HISTORY OF THE TARGETING OF MINORITIES APPEARED IN THE MOST
21 RECENT SURGEON GENERAL'S REPORT, WHICH WAS JUST PUBLISHED IN
22 1998. THE MATERIAL ON THE TARGETING TOWARDS WOMEN IS STILL
23 IN DRAFT STAGE; THAT IS, IT HAS NOT YET REACHED FINAL
24 PUBLICATION.

25 Q. OKAY. AND HAVE YOU PUBLISHED ANY BOOKS OR
26 CHAPTERS OF BOOKS THAT RELATE TO THE CIGARETTE INDUSTRY?

27 A. YES, I HAVE. I HAVEN'T PUBLISHED A BOOK AS
28 SUCH. I'VE PUBLISHED MOSTLY IN THE SCHOLARLY JOURNALS, THE
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0014

1 PEER REVIEW JOURNALS, AND MANY OF THOSE THINGS GET REPRINTED
2 ELSEWHERE IN VARIOUS BOOKS. SO THERE ARE A LARGE NUMBER OF
3 THOSE TYPES OF ITEMS.

4 Q. NOW, IN ADDITION TO YOUR TEACHING AND YOUR
5 RESEARCH, DO YOU ALSO HAVE ANOTHER RESPONSIBILITY AT THE
6 UNIVERSITY?

7 A. YES. I HAVE A TITLE OF THE CURATOR OF THE
8 HISTORY OF ADVERTISING ARCHIVES, WHICH MEANS THAT I HAVE
9 RESPONSIBILITIES FOR COLLECTION OF MATERIALS ON THE HISTORY
10 OF ADVERTISING. THOSE ARE A SPECIAL INTEREST LIBRARY,
11 DOCUMENTARY MATERIAL, LIKE THE TYPES OF DOCUMENTS THAT ARE
12 BEING PRODUCED IN LITIGATION LIKE THIS, EXAMPLES OF
13 ADVERTISING. AND ALSO WHAT'S CALLED EPHEMERA; THAT IS, THE
14 ODDS AND ENDS, THE BASEBALL CAPS AND THE TRINKETS AND THINGS
15 THAT ARE USED FOR PROMOTIONAL ACTIVITIES.

16 Q. IS THERE ANY FOCUS TO THIS HISTORY OF ADVERTISING
17 ARCHIVES?

18 A. IT WASN'T CONCEIVED TO HAVE THIS FOCUS. BECAUSE
19 OF MY PROFESSIONAL ENGAGEMENT OVER THE PAST DECADE, THE
20 COLLECTION THAT HAS GROWN GREATEST HAS BEEN THE CIGARETTE
21 ADVERTISING MATERIALS. SO THAT HOLDING, WHICH IS KNOWN AS
22 THE TOBACCO INDUSTRY PROMOTION SERIES, OR TIPS FOR SHORT,
23 T-I-P-S, IS BY FAR AND AWAY THE LARGEST COMPONENT OF THE
24 ARCHIVES.

25 Q. AND DID YOU HAVE TO DO RESEARCH AND REVIEW
26 INTERNAL CIGARETTE COMPANY DOCUMENTS TO DO THE RESEARCH THAT
27 YOU DID FOR YOUR PUBLICATIONS AND THE SURGEON GENERAL'S
28 REPORTS?

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0015

1 A. I DID. AT THE TIME I DRAFTED THAT, THERE WEREN'T
2 TOO MANY DOCUMENTS YET AVAILABLE. THE DOCUMENTS THAT WERE
3 AVAILABLE WERE PART OF THAT REVIEW PROCESS. AND IN
4 ADDITION, THE LITERATURE WAS REVIEWED, THAT IS BOTH THE
5 SCHOLARLY LITERATURE AND WHAT IS BEING WRITTEN IN WHAT IS
6 CALLED THE TRADE PRESS, THAT'S ADVERTISING MAGAZINES LIKE
7 ADVERTISING AGE OR EVEN THE BUSINESS PRESS, LIKE FORTUNE OR
8 BUSINESS WEEK, AND THINGS LIKE THAT.

9 SO IT WAS QUITE AN EXTENSIVE REVIEW OF THE
10 HISTORICAL RECORD TO GATHER EVERYTHING THAT COULD BE
11 GATHERED AT THAT TIME, INCLUDING SOME CORPORATE DOCUMENTS.

12 Q. AND YOU MENTIONED THAT YOU GATHERED WHATEVER WAS
13 THEN AVAILABLE WITH RESPECT TO CORPORATE DOCUMENTS?

14 A. YES. THERE'S BEEN MORE SURFACE SINCE THEN.

15 Q. AND HAVE YOU REVIEWED FOR SCHOLARLY RESEARCH AND
16 YOUR TEACHING PURPOSES THOSE ADDITIONAL CORPORATE DOCUMENTS
17 THAT HAVE BEEN RELEASED SUBSEQUENTLY?

18 A. YES, I HAVE. BOTH IN SOME OCCASIONS BECAUSE OF
19 MY ENGAGEMENT IN CASES LIKE THIS, AND OTHER OCCASIONS ON MY
20 OWN INITIATIVE I REVIEWED THE DOCUMENTS THAT WERE USED IN

21 TRIALS IN MINNESOTA AND THAT HAVE BEEN POSTED ON VARIOUS WEB
22 SITES.

23 Q. AND YOU HAVE PREVIOUSLY TESTIFIED IN TRIALS
24 INVOLVING CIGARETTE ISSUES?

25 A. YES, I HAVE.

26 Q. AND CAN YOU TELL US SOME OF THE DIFFERENT ISSUES
27 THAT YOU HAVE BEEN ASKED TO BE AN EXPERT WITNESS ON?

28 MR. OHLEMEYER: OBJECTION, YOUR HONOR.

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0016

1 RELEVANCE.

2 THE COURT: THAT'S AN OVERBROAD QUESTION. WHY
3 DON'T YOU ASK ANOTHER ONE AND WE'LL SEE WHETHER THERE IS AN
4 OBJECTION TO THAT OR NOT.

5 MS. CHABER: OKAY.

6 Q. YOU MENTIONED CIGARETTE CASES SIMILAR TO THIS
7 ONE. BY THAT, YOU MEAN THOSE THAT INVOLVE A PERSONAL INJURY
8 OF AN INDIVIDUAL; CORRECT?

9 A. THAT'S CORRECT.

10 Q. AND HAVE YOU TESTIFIED IN CASES THAT INVOLVE
11 STATES SUING THE TOBACCO COMPANIES FOR RECOUPMENT OF
12 MEDI-CAL EXPENSES?

13 MR. OHLEMEYER: OBJECTION, YOUR HONOR.

14 RELEVANCE.

15 THE COURT: SUSTAINED.

16 MS. CHABER: Q. HAVE YOU BEEN INVOLVED IN YOUR
17 RESEARCH AND TEACHING IN LOOKING AT CERTAIN ADVERTISING
18 CAMPAIGNS, SUCH AS THE JOE CAMEL CAMPAIGN OR THE MARLBORO
19 MAN CAMPAIGN, WITH RESPECT TO WHAT THE CONSUMER MESSAGE IS
20 IN THOSE CAMPAIGNS?

21 A. YES. BOTH BY VIRTUE OF THE FACT THAT THEY ARE
22 DISCUSSED IN THE SCHOLARLY LITERATURE AND THE SUBJECT OF MY
23 OWN RESEARCH AND ALSO IN CONJUNCTION WITH A SPECIFIC COURT
24 CASE I HAD THE OPPORTUNITY TO SEE THE CAMEL DOCUMENTS.

25 Q. AND HAVE YOU LOOKED AT INFORMATION FROM
26 ADVERTISING AGENCIES WITH RESPECT TO YOUR RESEARCH AND YOUR
27 TEACHING AND YOUR PUBLICATIONS?

28 A. YES, I HAVE. I DO THAT AS A MATTER OF COURSE IN
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0017

1 ALL OF MY TEACHING. I'M QUITE FAMILIAR WITH THE KINDS OF
2 DOCUMENTS THAT ARE PRODUCED BY ADVERTISING AGENCIES AND THE
3 MARKET RESEARCH FIRMS THAT ASSIST THEM. AND I'VE SEEN THOSE
4 SORTS OF DOCUMENTS WITH RESPECT TO TOBACCO.

5 Q. AND HAVE YOU ALSO IN THE COURSE OF YOUR RESEARCH,
6 TEACHING AND PUBLICATIONS LOOKED AT PUBLIC RELATIONS FIRMS?

7 A. YES, I HAVE. AND AGAIN, BOTH IN GENERAL AND WITH
8 SPECIFIC REFERENCE TO THE CIGARETTE INDUSTRY.

9 Q. AND WHAT IS YOUR BACKGROUND FOR PUBLIC RELATIONS
10 AND ANALYZING THE INFORMATION PROVIDED?

11 A. WELL, BY BACKGROUND IS FIRST AS A STUDENT. I WAS
12 TAUGHT ABOUT IT AND LEARNED ABOUT IT. THEN AS A SCHOLAR,
13 DOING SOME RESEARCH ON IT. AND AS AN AUTHOR, WRITING ABOUT
14 IT, BUT NOT AS A PRACTITIONER.

15 Q. YOU'VE NEVER WORKED IN A PUBLIC RELATIONS FIRM
16 DOING PUBLIC RELATIONS FOR ANY PARTICULAR COMPANY?

17 A. NO, I HAVE NOT.

18 Q. OKAY. YOU HAVE BASICALLY BEEN ON THE ACADEMIC
19 SIDE OF THAT?

20 A. THAT'S RIGHT, AS AN AUTHOR.

21 Q. AND HAVE YOU BEEN ASKED TO BE A SPEAKER AT OTHER
22 UNIVERSITIES?

23 A. YES.

24 Q. AND ON ISSUES RELATED TO THE CIGARETTE INDUSTRY?
25 A. YES. DURING THE PAST DECADE, MOST OF THOSE
26 INVITATIONS HAVE BEEN EXPRESSING AN INTEREST IN HEARING WHAT
27 I'VE COME TO LEARN ABOUT THE CIGARETTE INDUSTRY.
28 Q. AND DO YOU USE THE CIGARETTE INDUSTRY AS EXAMPLES

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0018

1 IN YOUR TEACHING FOR MAKING POINTS ABOUT THE TYPE OF THINGS
2 THAT YOU'RE TEACHING, MARKETING, ADVERTISING, PUBLIC
3 RELATIONS?
4 A. YES, FROM TIME TO TIME. BUT THE TEACHING, AS YOU
5 CAN APPRECIATE, ISN'T FOCUSED JUST ON THE CIGARETTE
6 INDUSTRY. YOU TEACH A BROAD RANGE OF TOPICS FOR A VERY
7 BROAD RANGE OF INDUSTRIES THAT STUDENTS WILL BE GOING INTO.
8 Q. HAVE YOU HAD ANY EXPERIENCE, RESEARCH, TRAINING
9 IN LOOKING AT AND ANALYZING PUBLIC POLLING INFORMATION?
10 A. YES. THAT'S PART OF THE BASICS OF CONSUMER
11 BEHAVIOR RESEARCH, UNDERSTANDING THE ART OF ASKING QUESTIONS
12 AND INTERPRETING POLLING RESULTS.
13 Q. LET ME ASK YOU THIS. WHAT ARE THE DIFFERENT
14 DISCIPLINES THAT ARE INVOLVED WITH THE TYPE OF WORK YOU DO
15 IN YOUR FIELD?
16 A. WELL, CONSUMER BEHAVIOR IS AN AREA WHICH PULLS
17 TOGETHER THE UNDERSTANDING OF BUSINESS PRACTICES AND
18 BUSINESS MANAGEMENT WITH PSYCHOLOGY. AND BECAUSE OF MY OWN
19 INTEREST, I'VE APPROACHED MANY OF THOSE QUESTIONS, PURSUING
20 THE HISTORICAL ASPECTS OF IT. SO I PERSONALLY, ALTHOUGH NOT
21 ALL PROFESSORS OF BUSINESS DO THIS, DEVELOPED SOME ABILITY
22 WITH HISTORICAL MATERIALS.
23 AS I SAY, THE DOMAIN OF MARKETING INCLUDES QUITE
24 A NUMBER OF SUBJECT AREAS, LIKE PUBLIC RELATIONS, PACKAGING,
25 EFFECTS OF WARNINGS, PRICING, CHANNELS OF DISTRIBUTION AND
26 SO ON.
27 Q. HAVE YOU AS PART OF YOUR WORK LOOKED AT DECEPTIVE
28 PRACTICES WITH RESPECT TO ADVERTISING AND MARKETING WITH

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0019

1 RESPECT TO THE CIGARETTE INDUSTRY?
2 MR. OHLEMEYER: OBJECTION, YOUR HONOR. IT'S
3 ARGUMENTATIVE.
4 THE COURT: SUSTAINED.
5 MS. CHABER: Q. HAVE YOU LOOKED AT -- IS THAT
6 PART OF THE WORK THAT YOU DO, LOOKING AT DECEPTIVE
7 PRACTICES?
8 THE COURT: THAT'S THE SAME QUESTION. I
9 SUSTAINED IT.
10 MS. CHABER: I WAS ASKING BROADLY. I DIDN'T
11 KNOW.
12 Q. AS PART OF YOUR WORK, DO YOU LOOK AT THE ETHICS
13 OF THE ADVERTISING AND MARKETING THAT'S DONE?
14 A. YES. ETHICS IS PART OF TEACHING AND ONE OF THE
15 VERY FIRST PAPERS I WROTE WAS ABOUT THE ETHICS OF
16 ADVERTISING.
17 Q. AND ARE YOU BEING REIMBURSED FOR YOUR TIME IN
18 COMING DOWN HERE FROM VANCOUVER TO TESTIFY?
19 A. THE EXPENSES WILL BE PAID FOR, BUT I DON'T
20 RECEIVE PERSONAL INCOME. I ASK INSTEAD THAT DONATIONS BE
21 MADE TO A UNIVERSITY RESEARCH ACCOUNT THAT ULTIMATELY FUNDS
22 GRADUATE STUDENTS.
23 Q. AND THAT'S WHAT'S BEING DONE IN THIS CASE?
24 A. YES.
25 MS. CHABER: YOUR HONOR, I WAS GOING TO BE
26 MOVING ON AND I UNDERSTOOD MR. OHLEMEYER WANTED TO ASK SOME

27 QUESTIONS.
28 MR. OHLEMEYER: I WILL SAVE THEM FOR CROSS, YOUR
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0020
1 HONOR.
2 THE COURT: YOU MAY PROCEED, MS. CHABER.
3 MS. CHABER: THANK YOU.
4 Q. NOW, WITH RESPECT TO THE HISTORY OF ADVERTISING,
5 OF TOBACCO ADVERTISING, CAN YOU GIVE US AN UNDERSTANDING OF
6 HOW FAR BACK YOU GO AND WHERE YOU START FROM?
7 A. WE HAVE EXAMPLES IN THE ADVERTISING ARCHIVES OF
8 CIGARETTE ADVERTISING FROM THE 19TH CENTURY, BUT MOST OF THE
9 MATERIAL WE HAVE IS 20TH CENTURY, BECAUSE IT'S NOT UNTIL
10 ABOUT 1914 THAT YOU HAVE NATIONAL ADVERTISING CAMPAIGNS OF
11 THE TYPE THAT WE'RE NOW FAMILIAR WITH, USING NATIONAL
12 ADVERTISING AGENCIES AND NATIONAL MEDIA PURCHASING.
13 SO MOST OF THE MATERIAL WE HAVE SORT OF STARTS
14 FROM THEN, FROM THE 19 TEENS AND CARRIES ON FOR THE LAST
15 THREE QUARTERS, EIGHT DECADES OF THE 20TH CENTURY.
16 Q. AND CAN YOU JUST TELL US WHAT IS ADVERTISING,
17 WHAT ARE PROMOTIONS? IS THERE A DIFFERENCE BETWEEN THEM?
18 A. WELL, THE TERMS ARE USED IN VARIOUS WAYS BY
19 VARIOUS AUTHORS. GENERALLY SPEAKING, WE TALK ABOUT
20 ADVERTISEMENTS AS THOSE THINGS WHERE YOU BUY THE MEDIA SPACE
21 OR TIME; THAT IS, YOU BUY A PAGE IN A MAGAZINE AND YOU FILL
22 IT WITH YOUR PRINTED MATERIAL OR YOU BUY 30 SECONDS OF
23 TELEVISION TIME AND YOU FILL IT WITH YOUR FILM OR RADIO OR
24 BILLBOARD, FOR THAT MATTER.
25 PROMOTIONS ARE THINGS LIKE THE SPONSORSHIP OF
26 EVENTS, WHERE THEN THE EVENT MAY GET SOME ADVERTISING OR MAY
27 GET FREE PUBLICITY BECAUSE IT'S WRITTEN UP IN THE
28 NEWSPAPER. ANOTHER FORM OF PROMOTION MIGHT BE A CONTEST
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0021
1 WHERE RETAIL SIGNS CALL ATTENTION TO THE CONTEST AND PEOPLE
2 FILL OUT ENTRY BLANKS AND WIN PRIZES.
3 OTHER KINDS OF PROMOTIONAL ACTIVITIES WOULD BE
4 THINGS LIKE T-SHIRTS AND BASEBALL CAPS AND CLOTHING ITEMS OF
5 VARIOUS KINDS.
6 SO GENERALLY SPEAKING, THE WORD PROMOTION IS USED
7 AS THE LARGER CONCEPT, REFERRING TO KIND OF ALL ACTIVITIES
8 THAT HELP KIND OF GET THE BRAND NAME VISIBLE AND WELL KNOWN,
9 WHEREAS ADVERTISING REFERS MORE NARROWLY TO THE PURCHASE OF
10 SPECIFIC MEDIA VEHICLES, THEY'RE CALLED, THAT IS, MAGAZINES,
11 NEWSPAPERS, BILLBOARDS AND SO ON.
12 Q. ARE THERE OTHER METHODS OF COMMUNICATIONS THAT
13 BUSINESSES HAVE AS THEIR RESOURCES THAT ARE NOT ADVERTISING
14 OR PROMOTION?
15 A. WELL, THE OTHER GENERAL DOMAIN WOULD BE CALLED
16 PUBLIC RELATIONS; THAT IS, THOSE EFFORTS DESIGNED TO GET
17 PUBLICITY OR TO INFLUENCE THE NATURE OF THE PUBLICITY ABOUT
18 THE INDUSTRY IN THE NEWSPAPERS OR ON TELEVISION, NEWS
19 COVERAGE, THINGS LIKE THAT.
20 Q. WITH RESPECT TO ADVERTISING, CAN YOU TELL US
21 WHETHER THERE ARE DIFFERENT ASPECTS TO ADVERTISING -- I'M
22 ASKING THIS AS A GENERAL CONCEPT -- WITH RESPECT TO AN AD
23 WHICH MAY HAVE PICTURES, WHICH MAY HAVE WORDS? CAN YOU GIVE
24 US AN IDEA WHAT YOU LOOK AT?
25 A. WELL, WHEN DOING AN ANALYSIS OF A PARTICULAR
26 ADVERTISING CAMPAIGN, FOR EXAMPLE, IF I UNDERSTAND YOUR
27 QUESTION, ONE TENDS TO FOCUS ON BOTH WHAT THE CENTRAL
28 PREMISE IS; THAT IS, WHAT IS THE BASIC APPEAL THAT'S BEING
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0022

1 MADE OR THE BASIC PROMISE THAT'S BEING HELD OUT FOR THE
2 PRODUCT, AND THEN LOOK AT THE EXECUTION, THAT IS THE WAY THE
3 WORDS ARE CRAFTED TO COMMUNICATE THAT IDEA AND THE WAY THE
4 IMAGES AND THE ART LAYOUT IS DESIGNED IN ORDER TO REINFORCE
5 CERTAIN ASPECTS OF THE PRODUCT OR CERTAIN ASPECTS OF THE
6 PROMISE.

7 Q. CAN YOU GIVE US SOME EXAMPLES?

8 A. WELL, I DIDN'T -- I DIDN'T ANTICIPATE THIS
9 QUESTION, SO I DON'T HAVE AN EXAMPLE OFF THE TOP OF MY
10 FINGERS. BUT GENERALLY SPEAKING, THE PRACTICE OF
11 ADVERTISING INVOLVES BOTH COPYWRITERS OR THE WORDSMITHS, THE
12 PEOPLE WHO DO THE WRITING FOR ADS, AND ART DIRECTORS, THE
13 PEOPLE WHO DO THE LAYOUTS, THE DESIGNS AND COMMISSION
14 PHOTOGRAPHY OR THE FILM WORK. SO THOSE ARE TWO BASIC
15 DIMENSIONS FOR ADVERTISING CAMPAIGN, EXECUTION AND THE
16 MANAGEMENT.

17 THE PEOPLE IN THE ADVERTISING AGENCY TOGETHER
18 WITH THE CLIENT ORGANIZATION WILL DECIDE UPON THE BASIC
19 THRUST OF THE CAMPAIGN; THAT IS, WHO ARE WE ADDRESSING AND
20 WHAT ARE WE TRYING TO GET ACROSS? THEY'LL DEVELOP A
21 STRATEGY, SAYING "WE WANT TO COMMUNICATE THIS ASPECT, LIKE
22 WE WANT TO COMMUNICATE INDEPENDENCE TO A YOUTH MARKET." AND
23 THEN THE ADVERTISING AGENCY WILL GO AHEAD AND DEVELOP SOME
24 CAMPAIGN IN ORDER TO DO THAT, TO GET THAT IDEA ACROSS.

25 Q. ARE THERE ADVERTISEMENTS THAT ARE EXPLICIT WITH
26 RESPECT TO WHAT THEY'RE TRYING TO GET ACROSS?

27 A. OH, YES. THERE ARE MANY ADS WHICH SIMPLY SAY IT
28 IN PLAIN, ORDINARY ENGLISH THAT, YOU KNOW, "THIS CAR GETS

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0023

1 MORE MILES PER GALLON THAN COMPETITIVE CARS," AND THAT IS
2 THE -- YOU KNOW, THAT FUEL ECONOMY IS THE BASIC APPEAL
3 THAT'S USED TO DRAW ATTENTION TO THAT CAR.

4 Q. ARE THERE ADVERTISEMENTS WHICH ONLY SUGGEST THE
5 IDEA THAT'S BEING ATTEMPTED TO BE COMMUNICATED?

6 A. THERE ARE LOTS OF ADVERTISEMENTS PARTICULARLY IN
7 THE MODERN ERA WHICH RELY -- SIMPLY RELY ON THE YOUTH AND
8 POWER OF IMAGE; THAT IS, YOU COMMUNICATE SOMETHING ABOUT THE
9 PRODUCT BY ITS USERS BY VIRTUE OF WHAT APPEARS IN THE
10 PICTURE. YOU COMMUNICATE, SAY, SOCIAL APPROVAL OR PEER
11 ACCEPTANCE BY SHOWING IT. NOT BY SAYING IT, BUT BY
12 DISPLAYING IT IN THE IMAGING ILLUSTRATION OR THE FILM.

13 Q. DR. POLLAY, I'M GOING TO GIVE YOU WHAT'S BEEN
14 PREMARKED -- A BINDER THERE'S BEEN PREMARKED AS PLAINTIFF'S
15 EXHIBIT 19. SO THIS IS THE NEW 19. AND WITHIN THAT, THERE
16 ARE ADDITIONAL EXHIBITS, EACH OF WHICH HAS BEEN MARKED AS
17 19-1 THROUGH 19-28.

18 FIRST OF ALL, DR. POLLAY, WITH RESPECT TO THE
19 EXHIBITS THAT ARE MARKED 19-1 THROUGH 7 --

20 A. YES.

21 Q. -- CAN YOU TELL US WHAT THOSE ARE?

22 A. YES. THOSE ARE ALL MATERIALS DRAWN FROM THE
23 ARCHIVES AND DISCUSSED IN A RECENT DEPOSITION IN VANCOUVER
24 IN EARLY DECEMBER.

25 Q. OKAY. AND ARE THOSE ALL ADVERTISEMENTS THAT ARE
26 CONTAINED THERE?

27 A. YES. THEY'RE ALL ADVERTISEMENTS FOR VARIOUS
28 CIGARETTES BRANDS, MOSTLY -- MAYBE EXCLUSIVELY POST-WORLD

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0024

1 WAR II; THAT IS, FROM THE 1940'S '50S '60S, AND A FEW EVEN
2 FOR THE CURRENT ERA.

3 Q. AND ARE THOSE ONES THAT YOU HAVE BROUGHT OUT FROM
4 I THINK YOU CALLED IT THE TIPS COLLECTION?

5 A. THAT'S CORRECT. THESE ARE MATERIALS -- THESE ARE
6 EXAMPLES DRAWN FROM THE HOLDINGS IN THE HISTORY OF
7 ADVERTISING ARCHIVES.

8 Q. AND TELL US AGAIN, BECAUSE I JUST REFERRED TO IT,
9 AS TO TIPS, WHAT THAT MEANS?

10 A. ALL TIPS, TOBACCO INDUSTRY PROMOTION SERIES,
11 MEANS IS JUST ONE OF THE COMPONENT PARTS OF THE ARCHIVES.
12 SO A SET OF BOXES, DOCUMENTS, BINDERS, COLLECTIONS OF ADS,
13 SLIDES, SO ON.

14 Q. NOW, IN TERMS OF THE DISCUSSION WE JUST HAD ABOUT
15 EXPLICIT I THINK WAS THE WORD YOU USED VERSUS SUGGESTIVE
16 ADVERTISING, CAN YOU GIVE US AN EXAMPLE FROM EXHIBITS 19-1
17 THROUGH 7?

18 THE COURT: THEY ARE NOT IN EVIDENCE.

19 MS. CHABER: OH, YOUR HONOR, I WOULD MOVE
20 EXHIBIT 19 INTO EVIDENCE.

21 THE COURT: ALL OF 19 OR 1 THROUGH 7?

22 MS. CHABER: ALL OF 19, YOUR HONOR.

23 THE COURT: ALL OF 19. HOW DO YOU WANT TO REFER
24 IT AS 19-1 THROUGH 28?

25 MS. CHABER: YES.

26 THE COURT: OKAY. ANY OBJECTION TO ANY OF
27 THAT?

28 MR. OHLEMEYER: NO, YOUR HONOR. I HAVE AN
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0025

1 ADMINISTRATIVE ISSUE THAT WE CAN PROBABLY TAKE UP AT A
2 BREAK.

3 THE COURT: I DON'T WANT TO LOSE CONTROL OF
4 THESE DOCUMENTS. MAYBE WE BETTER SPEND JUST ONE MINUTE
5 RIGHT NOW IN RESOLVING IT.

6 (COURT AND COUNSEL CONFER OUTSIDE
7 THE PRESENCE OF THE JURY)

8 THE COURT: OKAY. WE'RE BACK ON THE RECORD.

9 AS I UNDERSTAND IT, MS. CHABER, AM I RIGHT THAT
10 YOU'RE OFFERING PLAINTIFF'S 19 -- SO THE JURY UNDERSTANDS
11 WHAT WE'RE DOING, 1 THROUGH 28, I GUESS IT IS, HAVE BEEN
12 PREVIOUSLY MARKED FOR IDENTIFICATION PURPOSES. AND THEY
13 EACH HAVE A NUMBER OF SUBPARTS TO THEM. SO IF WE SAY 19-1
14 THROUGH SOMETHING, THOSE ARE SUBPARTS OF EXHIBIT 19. AND SO
15 YOU ARE OFFERING ALL OF 19, WHICH IS 19-SUBPART 1 THROUGH
16 28, INCLUDING EACH OF THE SUBPARTS?

17 MS. CHABER: YES, YOUR HONOR.

18 THE COURT: OKAY. ANY OBJECTION TO ANY OF
19 THAT?

20 MR. OHLEMEYER: NO OBJECTION, YOUR HONOR.

21 THE COURT: ALL RIGHT. 19 IN ITS ENTIRETY IS
22 RECEIVED, THAT IS INCLUDING ALL ITS SUBPARTS 1 THROUGH 28.

23 (DOCUMENT MORE PARTICULARLY
24 DESCRIBED IN THE INDEX RECEIVED
25 IN EVIDENCE AS PLAINTIFF'S
26 EXHIBIT #S 19-1 THROUGH 19-28)

27 MS. CHABER: Q. NOW BACK TO I THINK WHERE WE
28 WERE BEFORE WE BROKE. WITHIN EXHIBIT 19, ARE THERE EXAMPLES
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0026

1 OF WHAT WE WERE JUST DISCUSSING GENERALLY, THAT IS EXPLICIT
2 ADVERTISING AND SUGGESTIVE ADVERTISING?

3 A. YES. AND I MEAN, THERE ARE MANY, BECAUSE THERE'S
4 SEVERAL OF THESE. AND DURING OUR BREAK, I FOUND A FEW THAT
5 I THINK MIGHT BE ILLUSTRATIVE OF THAT.

6 Q. IF YOU COULD GIVE ME AN EXHIBIT NUMBER ON THE
7 BOTTOM, THEN WE CAN PUT IT ON THE OVERHEAD.
8 A. WE CAN BEGIN WITH A FAIRLY SIMPLE ONE. EXHIBIT
9 19-1-F, A CAMEL AD FROM ABOUT 1950 THAT SAYS "NOT ONE SINGLE
10 CASE OF THROAT IRRITATION DUE TO SMOKING CAMELS."
11 Q. WE NEED TO CATCH UP TO YOU. ONE SECOND.
12 IS THERE A WAY YOUR HONOR, JUST TO PARTIALLY
13 CLOSE DOWN THE LIGHTS?
14 THE COURT: SURE.
15 MS. CHABER: I'M LOOKING AT THE REFLECTION.
16 THE COURT: YES. ACTUALLY, OVER HERE. VERA,
17 MAYBE WE CAN DO IT. IS THERE ONE BACK THERE TOO?
18 THE CLERK: YES.
19 THE COURT: IS THAT GOOD? OKAY. IS THAT GOOD
20 FOR YOU?
21 MS. CHABER: IT'S FINE FOR ME. MY CONCERN IS
22 THAT THE JURY BE ABLE TO SEE.
23 THE COURT: JURORS, AS YOU KNOW -- I'M NOT GOING
24 TO REPEAT THIS EVERY TIME WE DO IT -- BUT IF AT ANY TIME
25 THROUGHOUT THE TRIAL YOU CANNOT SEE SOMETHING THAT'S BEING
26 SHOWN TO YOU OR HEAR SOMETHING THAT IS BEING SAID, RAISE
27 YOUR HANDS RIGHT AWAY AND LET US KNOW. SO WE'RE ALWAYS
28 GOING TO ASSUME THAT YOU CAN SEE AND HEAR EVERYTHING IF WE
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0027

1 DON'T HEAR FROM YOU. I DON'T HEAR FROM YOU, SO I THINK YOU
2 CAN GO AHEAD.
3 THE WITNESS: SO THE HEADLINE CONTAINS THE BASIC
4 PROMISE HERE THAT "NOT ONE SINGLE CASE OF THROAT IRRITATION
5 DUE TO SMOKING CAMELS." THAT IS THE IDEA BEING THAT CAMELS
6 WILL NOT BE IRRITATING TO YOUR THROAT, WON'T CAUSE YOU
7 COUGHS OR THROAT IRRITATION OR ANYTHING MORE SERIOUS THAN
8 THAT, PRESUMABLY.
9 THEN IT SHOWS THREE DIFFERENT CELEBRITIES, JOHN
10 WAYNE, JOAN CRAWFORD AND DICK POWELL WITH SMALL QUOTES WE
11 CAN'T REALLY READ UNDERNEATH THEM TALKING ABOUT THE MILDNESS
12 THAT THEY EXPERIENCE AND THEN AT THE BOTTOM --
13 Q. AND CAN I JUST STOP YOU THERE. IT SAYS THESE
14 STARS TESTED FOR MILDNESS?
15 A. YES. AS CONSUMERS, OF COURSE, PAID FOR THEIR
16 CELEBRITY ENDORSEMENT, THEY WERE WILLING TO HAVE THEIR
17 PICTURES AND NAMES APPEAR IN THESE ADS.
18 AND THEN AT THE BOTTOM OF THE PAGE, THIS
19 NOTION OF THAT IT WILL NOT CAUSE THROAT IRRITATION IS
20 REINFORCED WITH THIS T-DIAGRAM AROUND THE MOUTH AND THROAT
21 OF THIS WOMAN AND THE SUGGESTION HERE IS THAT YOU AS THE
22 CONSUMER --
23 MR. OHLEMEYER: EXCUSE ME, YOUR HONOR. I
24 OBJECT --
25 THE WITNESS: -- SHOULD --
26 THE COURT: HOLD ON JUST A SECOND. WHEN THERE
27 IS AN OBJECTION, YOU NEED TO STOP.
28 THE WITNESS: I DIDN'T HEAR IT.
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0028

1 MR. OHLEMEYER: I OBJECT TO THE TESTIMONY
2 BEGINNING WITH "THE SUGGESTION HERE" ON 801(A) GROUNDS.
3 THE COURT: WHY DON'T YOU REPHRASE THE QUESTION.
4 MS. CHABER: THE QUESTION WAS --
5 THE COURT: WHEN YOU SAY "THE SUGGESTION," I'M
6 DRAWING THE DISTINCTION BETWEEN WHAT THE PURPOSE WAS AND
7 WHAT THE MESSAGE IS. SO YOU NEED TO MAKE CLEAR WHICH IT IS
8 THAT YOUR QUESTION IS.

9 MS. CHABER: YOUR HONOR, I WAS ASKING HIM TO
10 GIVE A DISTINCTION BETWEEN EXPLICIT ADVERTISING AND
11 SUGGESTIVE ADVERTISING, WHICH ARE TERMS OF ART.
12 THE COURT: ALL RIGHT.
13 MS. CHABER: AND I DON'T KNOW HOW ELSE TO ASK
14 THAT.
15 THE COURT: WITH THE UNDERSTANDING AS TO WHAT
16 "SUGGESTIVE" MEANS HERE. I TAKE IT THERE IS NO OBJECTION
17 TO THAT, AM I RIGHT, IF THAT'S THE UNDERSTANDING OF WHAT THE
18 WORD "SUGGESTIVE" MEANS? WHAT SHE IS SAYING IS --
19 MR. OHLEMEYER: I DON'T UNDERSTAND THE QUESTION.
20 THE COURT: IF I UNDERSTAND IT, YOU ARE ASKING
21 HIM WHAT THE EFFECT IS ON A CONSUMER OR WHAT A CONSUMER
22 WOULD UNDERSTAND?
23 THE WITNESS: PERHAPS I CAN WITHDRAW THE WORD
24 "SUGGESTIVE."
25 THE COURT: WHY DON'T YOU WORD START ALL OVER.
26 LET ME SUSTAIN THE OBJECTION TO THE WORD "SUGGESTIVE," BUT
27 WITHOUT PREJUDICE TO YOUR PURSUING THIS.
28 MS. CHABER: OKAY.
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0029

1 Q. IS THERE SOME TERM OF ART THAT WOULD DISTINGUISH
2 BETWEEN WHAT IS EXPLICITLY SAID IN AN ADVERTISEMENT WHICH
3 YOU INDICATED FOR US AND WHAT MIGHT BE IMPLICIT?
4 A. YES. THE OLD TERMS OF ART WERE HARD SELL VERSUS
5 SOFT SELL FOR COPY-BASED PROMISES VERSUS IMAGE, THE USE OF
6 IMAGE APPEALS. IN DISCUSSING THIS AD, I WAS CALLING
7 ATTENTION TO THE FACT THIS OF IDEA "IT WILL NOT HARM YOUR
8 THROAT. THERE IS NOT ONE SINGLE CASE OF THROAT IRRITATION"
9 IS REINFORCED BY THE CELEBRITIES ECHOING THAT IDEA IN
10 TALKING ABOUT THE MILDNESS THAT THEY EXPERIENCE. AND THEN
11 ALSO WITH A PROMPT THROUGH THE CONSUMERS, THAT CONSUMERS
12 SHOULD TEST CAMEL IN THE SCENARIO T-ZONE, THE T-ZONE BEING
13 SHOWN IN THE DIAGRAM BEING THE THROAT, THE MOUTH AND THROAT
14 AREA. SO WE SEE ANATOMICALLY WHAT'S BEING REFERRED TO, THE
15 T-ZONE WHERE NO IRRITATION WILL OCCUR.
16 SO THAT'S A FAIRLY EXPLICIT KIND OF HEALTH
17 MESSAGE; THAT IS, TO SUGGEST THAT THERE WILL BE NO SYMPTOMS
18 OF THIS NATURE AS A RESULT OF SMOKING THIS PRODUCT.
19 AN EXAMPLE OF A MUCH MORE INDIRECT WAY OF
20 COMMUNICATING HEALTHFULNESS CAN BE SEEN IN 19-1-P, WHICH IS
21 A MARLBORO SPORTS CALENDAR TAKEN FROM SPORTS ILLUSTRATED.
22 Q. AND WHAT DO YOU MEAN BY THAT?
23 A. WELL, HERE THE BRAND NAME IS JUST PRESENTED ON
24 THE PAGE IN ASSOCIATION WITH A VARIETY OF SPORTING EVENTS.
25 WE DON'T SEE IT HERE (INDICATING), BUT THE NEXT PAGE WOULD
26 HAVE BEEN A LIST OF VARIOUS KINDS OF EVENTS. THAT WAS A
27 CALENDAR APPROACH AND IN THIS ASSOCIATION WITH SPORTING
28 EVENTS, JUST LIKE HAVING THE SIGN AT THE SPORTS STADIUM OR
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0030

1 SPONSORING A TENNIS TOURNAMENT OR ANYTHING LIKE THAT, YOU
2 LINK UP THE BRANDS IN THE CONSUMER'S MIND WITH THE
3 ATHLETICISM.
4 AND SO BY IMPLICATION, IT'S HEALTHY, BUT THEY
5 DON'T SAY IT'S HEALTHY. YOU ARE NOT SAYING EXPLICITLY, YOU
6 KNOW, "MARLBORO IS A HEALTHY CIGARETTE BECAUSE ATHLETES ARE
7 COMFORTABLE WITH ITS ADVERTISING OR ATHLETES SMOKE IT."
8 YOU'RE JUST DOING IT BY IMPLICATION.
9 BY ASSOCIATIVE ADVERTISING -- THAT IS ANOTHER
10 TERM OF ART THAT ANSWERS YOUR QUESTION EARLIER, WHICH IS WHY
11 THE DISTINCTION BETWEEN ASSOCIATIVE ADVERTISING AND

12 INFORMATIVE ADVERTISING. THAT IS IN INFORMATIVE
13 ADVERTISING, YOU PRESENT SOME FACTS AND DATA AN EVIDENCE AND
14 ARGUMENT ABOUT THE PRODUCT.

15 IN ASSOCIATIVE ADVERTISING, YOU SIMPLY PUT THE
16 BRAND NAMES IN CONJUNCTION WITH CERTAIN CELEBRITIES, CERTAIN
17 EVENTS, CERTAIN LIFE-STYLES AND LET THE CONSUMER MAKE THAT
18 PAIRED LINKAGE IN THEIR OWN MIND.

19 Q. NOW, ARE THERE OTHER EXAMPLES OF EXPLICIT HEALTH
20 CLAIMS WITHIN EXHIBIT 19?

21 A. THERE'S ANOTHER SERIES OF ADS FOR THE KENT
22 PRODUCT THAT SHOW HOW THE STYLE OF ADVERTISING CHANGED OVER
23 TIME AND THE DIFFERENT WAYS IN WHICH THE ADVERTISING COULD
24 GET ITS MESSAGE ACROSS USING A VARIETY OF IMPLICIT TACTICS.
25 SO THERE'S ONE AD, WHICH IS THE WAY THE KENT WAS INTRODUCED,
26 WHICH WAS FAIRLY EXPLICIT, AND THAT'S 19-2-G. IT STARTS
27 WITH A LEAD LINE ABOUT THE AMERICAN MEDICAL ASSOCIATION.

28 Q. YES. UNFORTUNATELY, OURS IS THE ONLY COPY I
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0031

1 THINK THAT DOESN'T HAVE THE EXACT SUB A, B, C'S.

2 A. IT WOULD BE IN 19.2 AND IT WILL APPEAR AS IT DOES
3 ON SCREEN. YOU HAVE THE CORRECT ONE THERE.

4 Q. OKAY. WHAT IS THIS AD? WHAT IS THE EXPLICITNESS
5 OF THE AD?

6 A. MAYBE I SHOULD JUST READ THE TOP OF THE AD. I'M
7 NOT SURE EVERYONE CAN READ IT. FROM THIS ANGLE, I WOULD
8 HAVE TROUBLE READING THE SCREEN. "THE AMERICAN MEDICAL
9 ASSOCIATION VOLUNTARILY CONDUCTED IN THEIR OWN LABORATORY A
10 SERIES OF INDEPENDENT TESTS OF FILTERS AND FILTER CIGARETTES
11 AS REPORTED IN THE JOURNAL OF THE AMERICAN MEDICAL
12 ASSOCIATION. THESE TESTS PROVED OF ALL THE FILTERS TESTED,
13 ONE TYPE WAS MOST EFFECTIVE FOR REMOVING TARS AND NICOTINE.
14 THIS TYPE FILTER IS USED BY KENT AND ONLY KENT." AND SOME
15 OF THOSE WORDS ARE IN BOLD.

16 SO IF YOU WERE JUST TO READ THE BOLD WORDS, IT
17 SAYS "AMERICAN MEDICAL ASSOCIATION TESTS PROVE THE MOST
18 EFFECTIVE FILTER IS USED BY KENT." IT'S JUST A SHORTER WAY
19 OF GETTING THE SAME IDEA ACROSS.

20 Q. AND THEN WITHIN THIS, FURTHER DOWN ARE THERE
21 FURTHER CLAIMS MADE?

22 A. YES. THE SUBHEADING DOWN BELOW THE SIGNATURE.
23 IF YOU COULD ACTUALLY LIFT THAT IMAGE JUST A BIT, JUST ABOVE
24 WHERE IT SAYS "KENT" THERE, IT SAYS "FOR THE GREATEST
25 PROTECTION OF ANY FILTER CIGARETTE, KENT WITH THE EXCLUSIVE
26 MICRONITE FILTER."

27 SO HERE THEIR PROMISE IS HEALTH PROTECTION AS THE
28 ENDORSEMENT IMPLIED, FROM THE AMERICAN MEDICAL ASSOCIATION

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0032

1 AND THEIR RESEARCH AND TESTING AND WHAT THEY PUBLISHED IN
2 THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION. AND SO
3 THAT'S BEING USED TO MAKE, IN MY VIEW, IS A FAIRLY EXPLICIT
4 HEALTH PROMISE ABOUT THIS PARTICULAR PRODUCT.

5 Q. AND THEN WHAT IS THE POTENTIAL EFFECT ON THE
6 CONSUMER'S EXPECTATION FROM AN ADVERTISEMENT SUCH AS THIS
7 WITH THOSE KINDS OF EXPLICIT CLAIMS?

8 A. THAT TO THE EXTENT THERE WERE RISKS ASSOCIATED
9 WITH SMOKING, THAT THOSE RISKS WOULD BE DEALT WITH BY
10 SWITCHING TO A FILTER PRODUCT, PARTICULARLY THIS KENT
11 FILTERED PRODUCT THAT OFFERED PROTECTION AGAINST ANY HEALTH
12 RISK.

13 Q. NOW, YOU INDICATED THERE WAS A SERIES THAT SHOWED
14 THE CHANGING OF THESE ADVERTISEMENTS?

15 A. YES. THE STYLE OF CAMPAIGN USED TO LAUNCH THE
16 PRODUCT WAS THE LARGEST ADVERTISING LAUNCH IN THE HISTORY OF
17 ADVERTISING AT THE TIME. IT HAPPENED IN THE EARLY 1950S AND
18 RAN FOR SEVERAL YEARS. AND ONCE THE CREDIBILITY FOR FILTERS
19 WAS ESTABLISHED, THEY MOVED TO OTHER TYPES OF MORE IMPLIED
20 IMAGERY.

21 I HAVE ONE HERE THAT'S IN 19-4 MARKED G. IT
22 SHOWS A PICTURE OF A RACQUETBALL PLAYER, A TENNIS PLAYER.

23 Q. JOHN WAYNE, DICK POWELL AND JOAN CRAWFORD?

24 A. WE'LL GET TO THAT. WE CAN DISCUSS THAT ONE
25 FIRST, IF YOU WANT.

26 Q. I THOUGHT THAT WAS THE TENNIS PLAYER ON THE
27 BOTTOM THERE.

28 A. NO. THERE'S YET ANOTHER ONE.
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0033

1 Q. THE ONE BEFORE THAT?

2 A. YES.

3 Q. OKAY.

4 THE COURT: CAN WE GET THE NUMBER FOR THE
5 RECORD?

6 MS. CHABER: THIS WAS 19-G YOUR HONOR.

7 MS. WHITE: 19-4-G.

8 THE COURT: 19-4-G.

9 THE WITNESS: THIS ONE, IF YOU READ THE WORDS,
10 IT DOESN'T SAY A LOT ABOUT THE CIGARETTE. IT SAYS "WHEN YOU
11 KNOW WHAT COUNTS -- THAT'S A BIT VAGUE -- AND THEN "TASTE
12 YOU CAN COUNT ON."

13 AT ONE LEVEL, THE PROMISE SEEMS TO BE ABOUT
14 TASTE. BUT THE IMAGERY HERE I THINK IS DOING THE WORK. THE
15 AD IMAGERY IS ASSOCIATING KENT WITH SOMEONE WHOSE LIFE-STYLE
16 INCLUDES VIGOROUS AEROBIC ACTIVITIES, THAT IS PLAYING
17 RACQUETBALL, A RACKET SPORT. IN FACT, HE'S OBVIOUSLY IN THE
18 LOCKER ROOM AS WE SEE HIM SMOKING THIS PRODUCT EITHER JUST
19 BEFORE OR AFTER HAVING PLAYED.

20 MS. CHABER: Q. AND WHAT IS THE POTENTIAL
21 EFFECT ON THE CONSUMER OF AN AD SUCH AS THIS?

22 A. TO SAY SMOKING IS CONSISTENT WITH THE HEALTHY
23 LIFE-STYLE, TO SEE THAT AS HAVING BEEN ENGAGED IN BY PEOPLE
24 WHO ARE ALSO ENGAGED IN THESE KINDS OF AEROBIC OR ATHLETIC
25 ACTIVITIES.

26 Q. YOU MENTIONED EARLIER ON THE KENT AD JUST BEFORE
27 THIS THAT THIS WAS AROUND 1952 WHEN THAT PRODUCT WAS -- THE
28 KENT FILTER CIGARETTE WAS LAUNCHED?

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0034

1 A. YES. THIS ONE IS MUCH, MUCH LATER. THIS IS
2 ALMOST 30 YEARS LATER. THIS IS FROM THE 1980'S. AND WE'LL
3 SEE A COUPLE OF MORE THAT WILL SHOW US WHAT THEY WERE DOING
4 IN THE MEANTIME. WE'RE A BIT OUT OF SEQUENCE HERE.

5 Q. BUT I DO WANT TO ASK YOU WHEN THE FILTER
6 CIGARETTES CAME ON THE MARKET IN THE EARLY 1950S, WAS THAT
7 AT A TIME PERIOD WHEN THERE HAD BEEN INFORMATION RELEASED
8 FROM THE PUBLIC HEALTH COMMUNITY WITH RESPECT TO CIGARETTES
9 BEING A CAUSE OF LUNG CANCER?

10 A. THERE HAD BEEN SOME STUDIES AND SOME MAGAZINES,
11 PARTICULARLY READER'S DIGEST HAD PUBLISHED ARTICLES IN THE
12 EARLY 1950S CREATING WHAT THE INDUSTRY CALLED A HEALTH SCARE
13 AND SEVERAL -- THERE WERE SEVERAL RESPONSES, BUT I THINK ONE
14 OF THE MORE IMPORTANT ONES WAS THE INTRODUCTION OF FILTERS
15 OR THE ADDITION FILTERS TO CIGARETTE PRODUCTS.

16 AND THE MARKET VERY RAPIDLY SWITCHED OVER TOWARD
17 FILTERS; THAT IS, FILTERS WERE SOLD BY MANY MANUFACTURERS AS

18 A RESPONSE TO THE HEALTH PROBLEM AND WITH EITHER THE
19 EXPLICIT OR IMPLICIT SUGGESTION THAT THIS WAS A MEANINGFUL
20 STEP TOWARD IMPROVING YOUR HEALTH PROSPECTS.

21 Q. WHAT IS NEXT IN THE CONTEXT OF LOOKING AT THE
22 CHANGING OF THIS PARTICULAR AD CAMPAIGN?

23 A. YES. THE NEXT AD IN MY BOOK, H, WHICH IS THE
24 WOMAN CARRYING A RACKET AND LIGHTING A CIGARETTE. AND THIS
25 IS SLIGHTLY DIFFERENT IN THAT, FIRST OF ALL, THE IMAGE IS
26 NOT IN COLOR. IT'S NOT AS LARGE AS THE PREVIOUS ONE.
27 THERE'S A LITTLE MORE WHAT WE CALL BODY COPY.

28 Q. WHAT DOES THAT MEAN?

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0035

1 A. JUST ALL FINE PRINT. THE NUMBER OF WORDS, THE
2 AMOUNT OF SPACE GIVEN OVER TO THE WORDS AND THE DETAIL. THE
3 HEADLINE HERE MAKES REFERENCE TO "YOUR VOICE OF WISDOM."
4 AND IF YOU SEE THE PICTURE, THERE'S THE PERSON AND WHAT
5 SEEMS TO BE A REPRESENTATION OF ALMOST LIKE THE GHOST OR
6 CONSCIENCE OF THE PERSON THAT IS THE SAME PERSON BEING
7 PORTRAYED IN A MORE SHADOWY WAY, WHISPERING IN THE EAR. SO
8 IT'S "YOUR VOICE OF WISDOM" SUGGESTING THAT, YOU KNOW, "YOU
9 SHOULD SMOKE KENT" I THINK IS THE WAY THIS WAS DESIGNED TO
10 COMMUNICATE, THAT BECAUSE THE KENT MICRONITE FILTER, AS HAD
11 BEEN PREVIOUSLY COMMUNICATED, WAS OFFERING HEALTH
12 PROTECTION.

13 Q. THERE'S SOME LANGUAGE THERE AS WELL -- I'M GOING
14 TO TRY TO JUST ENLARGE THIS -- WHERE IT SAYS "ONLY KENT GOES
15 TO THE EXTRA EXPENSE TO GIVE YOU THE EXCLUSIVE SCIENTIFIC
16 MICRONITE FILTER."

17 THE USE OF THE WORD "SCIENTIFIC," WHAT IS THE
18 POTENTIAL EFFECT ON THE CONSUMER?

19 A. WELL, THE FILTERS WERE -- MANY FILTERS, INCLUDING
20 KENT, WERE SOLD WITH THE IDEA THAT THE FILTER TECHNOLOGY WAS
21 THE FRUIT OF SCIENCE AND RESEARCH AND WAS THE RESOLUTION OF
22 THE HEALTH ISSUE THAT IS, THIS WAS COMING OUT OF THE
23 LABORATORIES OF THE NATION IN ORDER TO SOLVE THE PROBLEM
24 THAT PEOPLE MIGHT HAVE HEARD ABOUT.

25 Q. WOULD THE ORDINARY CONSUMER GET A MESSAGE FROM
26 THIS THAT WHATEVER HEALTH SCARE HAD COME ABOUT, THE PROBLEM
27 HAD BEEN SOLVED?

28 A. YES, I BELIEVE THAT'S THE CASE. IF NOT FROM AN
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0036

1 INDIVIDUAL AD, CERTAINLY FROM THE COLLECTION OF SCORES OF
2 ADS FOR MANY, MANY DIFFERENT BRANDS REPEATING THIS IDEA OVER
3 MANY YEARS.

4 Q. AND WE'LL TALK ABOUT THE SATURATION OF THE
5 VARIOUS MEDIA WITH ADVERTISEMENTS SUBSEQUENTLY, BUT I
6 WANTED -- DOES THIS COMPLETE --

7 A. YES. I MEAN, THERE ARE OTHER ECONOMICS TO IT.
8 KENT AT THE TIME WAS A LITTLE MORE EXPENSE THAN COMPETITIVE
9 BRANDS. SO PART OF THIS IDEA IS THIS EXTRA EXPENSE. IT
10 SAYS IN THE FINE PRINT "YES, YOU HAVE TO PAY A FEW PENNIES
11 MORE," BUT THE REAL QUESTION IS "CAN YOU AFFORD NOT TO BUY
12 THIS PROTECTION?" THAT'S THE IMPLICIT PART OF BUYING THIS
13 PROTECTION. SO IT'S JUSTIFYING THE EXTRA EXPENSE.

14 THERE IS ONE MORE KENT AD WHICH SHOWS A SLIGHTLY
15 DIFFERENT TECHNIQUE, 19-4-K. IT'S ONE THAT'S ALL IN WHITE.
16 THAT'S RIGHT. IT'S A COUPLE BOTH DRESSED FROM HEAD TO TOE
17 IN WHITE SHOT AGAINST A WHITE BACKGROUND. EVEN THE FLOWER
18 POT IS WHITE AND THE BASKET CONTAINING THE FLOWERS IS
19 WHITE. OF COURSE, THE CIGARETTE PACK IS WHITE.

20 AND NOTHING ABOUT THAT IS SAID IN THE COPY, BUT

21 THE USE OF THE WHITE HERE ESTABLISHES A VISUAL IMPRESSION OF
22 PURITY. IT'S TOTALLY UNCONTAMINATED. SO IT'S REINFORCING
23 THE IDEA OF SAFETY, IN MY VIEW.

24 Q. AND THIS IS AN AD FROM 1964?

25 A. THIS IS FROM 1964. SO THE CAMPAIGN HAD BEGUN IN
26 THE '50S WITH SOME VERY EXPLICIT HEALTH PROMISE TALK ABOUT
27 HEALTH PROTECTION, THE FILTER AND THE AMERICAN MEDICAL
28 ASSOCIATION TESTS. AND THEN ONCE THAT IDEA HAD BEEN

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0037

1 ESTABLISHED BY THEMSELVES AND OTHER MARKETERS OF OTHER
2 FILTERED PRODUCTS, THEN THE ADVERTISING STYLE MOVED TOWARD
3 MORE OBLIQUE WAYS OF COMMUNICATING HEALTH, THAT IS IMAGERY
4 THAT SUGGESTED HEALTH BECAUSE OF PURE AND PRISTINE SIGNS,
5 PEOPLE ENGAGED IN AEROBIC ACTIVITIES IN THE HEALTHY
6 OUTDOORS. SMOKE ITSELF HAS DISAPPEARED FROM CIGARETTE ADS.
7 AND OTHER WAYS --

8 Q. WHAT DO YOU MEAN BY THAT?

9 A. WELL, IT'S BEEN 25 YEARS OR SO SINCE WE'VE SEEN
10 ANY VISIBLE SMOKE IN CIGARETTE ADS. I MEAN, IT'S ONE OF THE
11 IRONIES OF CIGARETTE ADVERTISING THAT YOU DON'T SEE ANY
12 SMOKE IN IT. THE LOGIC THERE IS THAT THE SMOKE IS A LITTLE
13 TOO DIRTY --

14 MR. OHLEMEYER: OBJECTION, YOUR HONOR.

15 THE COURT: -- JUST LIKE --

16 MR. OHLEMEYER: OBJECTION, YOUR HONOR.

17 THE COURT: WHEN THERE IS AN OBJECTION, YOU ARE
18 GOING TO NEED TO STOP.

19 MR. OHLEMEYER: I THINK HE'S ANSWERED THE
20 QUESTION AND IT'S A NONRESPONSIVE RESPONSE.

21 THE COURT: STARTING WITH "THE LOGIC" WAS NOT
22 RESPONSIVE?

23 MR. OHLEMEYER: YES.

24 THE COURT: I WILL STRIKE IT AS NOT RESPONSIVE.

25 MS. CHABER: Q. DOCTOR, THE FACT THAT THERE IS
26 NO SMOKE BEING PORTRAYED IN THIS ADVERTISEMENT, THIS ISN'T
27 AN UNUSUAL CASE, AN ABERRATION FROM THE ADS OF THE CIGARETTE
28 INDUSTRY, IS IT?

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0038

1 A. NO. JUST THE OPPOSITE. YOU WOULD BE HARD
2 PRESSED TO FIND ANY CIGARETTE AD IN THE LAST QUARTER CENTURY
3 THAT DID SHOW SMOKE.

4 Q. AND WHAT IS THE POTENTIAL EFFECT ON THE
5 CONSUMER'S EXPECTATION WITH RESPECT TO THE NOT SHOWING OF
6 SMOKE?

7 A. AGAIN, IT'S TO KEEP THE IMAGE AS CLEAN AND PURE
8 AS POSSIBLE. IF YOU WERE TO INCLUDE SMOKE OR TO INCLUDE
9 ASHTRAYS, YOU WOULD REMIND PEOPLE ABOUT SOME OF THE DIRTIER
10 ASPECTS OF SMOKING.

11 Q. AND 1964 IS THE TIME PERIOD WHEN THE FIRST
12 SURGEON GENERAL'S REPORT HAS BEEN ISSUED ON THE HEALTH
13 HAZARDS AND THE POSSIBLE CANCER OR THE CANCER CAUSATION OF
14 CIGARETTE SMOKING?

15 A. THAT'S CORRECT. THAT WAS THE DATE OF THE VERY
16 FIRST SURGEON GENERAL'S REPORT ON THE TOPICS.

17 Q. OKAY. AND HAS THIS CONTINUED ON TO THIS DAY,
18 THAT SMOKE AND ASHTRAYS, CIGARETTE BUTTS, THINGS SUCH AS
19 THAT ARE NOT SHOWN IN ADVERTISEMENTS?

20 A. YES. ALTHOUGH, I CAN THINK OF ONE EXCEPTION
21 WHERE I DO REMEMBER ONE ASHTRAY IN AN AD. BUT GENERALLY
22 SPEAKING, IN THE THOUSANDS OF ADS THAT HAVE BEEN INTRODUCED
23 BY THE CIGARETTE INDUSTRY SINCE THEN, IT'S A VERY, VERY RARE

24 PHENOMENON TO SEE SMOKE OR AN ASHTRAY.
25 MS. CHABER: YOUR HONOR, I KNOW WE HAD STARTED
26 LATE. I WANTED TO FIND OUT WHEN YOU WANTED TO TAKE A
27 BREAK?
28 THE COURT: I WAS GOING TO ASK YOU THE SAME
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0039

1 QUESTION.
2 MS. CHABER: ANY TIME IS FINE.
3 THE COURT: JURORS, I'M JUST GOING TO GIVE YOU A
4 15-MINUTE RECESS INSTEAD OF 20 MINUTES, BECAUSE WE GOT OFF
5 TO A LATE START. LET'S COME BACK A LITTLE AFTER 11:15.
6 LET'S GET BACK AT A LITTLE AFTER 11:15, PLEASE.
7 (RECESS TAKEN FROM 11:03 TO 11:16)
8 THE COURT: WE'RE BACK ON THE RECORD. I THINK
9 EVERYBODY IS HERE. MS. CHABER, YOU MAY PROCEED.
10 MS. CHABER: THANK YOU.
11 Q. DR. POLLAY, YOU HAVE IN FRONT OF YOU PLAINTIFF'S
12 EXHIBIT 19 AND THERE ARE NUMEROUS ADS IN EXHIBIT 19. RIGHT
13 NOW I WANT TO FOCUS ON EXHIBITS 19-1, 2, 3, 4, 5, 6, 7. BUT
14 BEFORE WE GET TO THAT, I WANT TO ASK YOU HOW REPRESENTATIVE
15 ARE THE EXHIBITS CONTAINED WITHIN THE PLAINTIFF'S EXHIBIT
16 19?
17 A. THEY ARE ALL FOR CAMPAIGNS THAT WERE LARGE
18 CAMPAIGNS FOR MAJOR BRANDS. I THINK THAT'S TRUE WITHOUT
19 EXCEPTION. THERE MAY BE A FEW THAT ARE FOR MINOR BRANDS.
20 SO IN THAT SENSE, THEY'RE QUITE REPRESENTATIVE. THERE HAVE,
21 OF COURSE, BEEN MANY, MANY BRANDS OVER THE YEARS AND WE'RE
22 TALKING A TIME SPAN OF A HALF CENTURY. SO THERE'S BEEN LOTS
23 AND LOTS OF ADVERTISING CAMPAIGNS WHICH AREN'T SHOWN HERE.
24 I MEAN, IT'S NOT AN EXHAUSTIVE REPRESENTATION. TO DO THAT
25 WOULD TAKE LITERALLY A TABLE FULL OF SUCH BINDERS.
26 Q. LET ME ASK YOU THIS. WHAT FRACTION OR PERCENTAGE
27 OF THE OVERALL ADVERTISEMENTS FROM THE 1940'S TO THE PRESENT
28 DOES BINDER 19 REPRESENT?

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0040

1 A. I THINK THERE ARE ABOUT 100 EXAMPLES HERE, AND I
2 HAVE TO MAKE AN ESTIMATE. IT WOULD BE ACTUALLY A VERY, VERY
3 SMALL FRACTION OF THE TOTALITY OF ADS THAT HAVE ACTUALLY
4 BEEN DESIGNED AND DEPLOYED, THAT IS PUT INTO THE PUBLIC'S
5 DOMAIN. THERE ARE LITERALLY HUNDREDS OF ADS HERE. SO AT
6 THE MOST, I GUESS 125TH OF WHAT'S BEEN PRODUCED OVER THE 25
7 YEARS, MAYBE EVEN FAR LESS THAN THAT.
8 Q. IN TERMS OF WHAT'S IN EXHIBIT 19, AT LEAST
9 THROUGH, I THINK -- WHAT DOES IT GO UP TO, 26, 25, THE LAST
10 TWO? -- EXCLUDING THE LAST TWO EXHIBITS, THESE ARE EXAMPLES
11 OF ADVERTISEMENTS FROM MAGAZINES?
12 A. YES. SECTIONS 8 THROUGH 26 ARE -- THROUGH 24 --
13 SORRY -- ARE EXAMPLES OF POPULAR PICTURE MAGAZINES, LIFE AND
14 LOOK FROM THE PERIOD OF THE '50S AND '60S, IF I REMEMBER
15 CORRECTLY, CERTAINLY THE '60S, AND UP UNTIL THE EARLY '70S.
16 AND SO WHAT YOU SEE THERE ARE THE COVERS AND THE CIGARETTE
17 ADS THAT HAVE APPEARED IN THOSE MAGAZINES.
18 Q. BUT AM I CORRECT THAT ALL OF THOSE THAT WE'VE
19 JUST DEFINED, 19-1 THROUGH 24, REPRESENT ADVERTISEMENTS
20 SOLELY FROM MAGAZINES OR PRINT MEDIA, I SHOULD SAY?
21 A. YES. I ACTUALLY THINK IT PROBABLY IS TRUE THAT
22 THEY ARE PRIMARILY FROM MAGAZINES. THERE MIGHT BE ONE OR
23 TWO THAT ARE FROM NEWSPAPERS OR TRADE SOURCES RATHER THAN
24 PUBLIC MAGAZINES. AND THERE'S ONE -- THERE'S A COUPLE,
25 RATHER, THAT ARE PHOTOGRAPHS I'VE TAKEN OF BILLBOARDS OF
26 CANDY, CIGARETTES, THINGS LIKE THAT.

27 Q. OKAY. WE'LL SET THOSE ASIDE. WE CAN IDENTIFY
28 THEM WHEN WE GET THERE. SO WE'RE TALKING ABOUT PUBLICATIONS
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0041

1 OF THESE ADS; IS THAT CORRECT?

2 A. YES.

3 Q. OKAY. AND THERE ARE OTHER PLACES THAT
4 ADVERTISING IS DONE BY THE CIGARETTE INDUSTRY, AND I THINK
5 YOU'VE JUST DESCRIBED BILLBOARDS. WHAT ELSE?

6 A. BILLBOARDS -- IN THE MODERN ERA, IT'S BILLBOARDS,
7 RETAIL STORE SIGNAGE, LOTS OF DIFFERENT TYPE OF SIGNAGE,
8 WINDOW SIGNAGE IN THE PUBLIC. THAT IS THE THINGS THAT ARE
9 ON THE DOOR THAT YOU MAY PUSH ON, BASKETS THAT YOU CARRY
10 AROUND A STORE, DIVIDERS AT THE CHECKOUT COUNTERS, QUITE A
11 VARIETY OF THINGS POSSIBLE AT RETAIL STORE.

12 THEN OTHER TYPES OF TRANSIT ADVERTISING, THAT IS
13 ON BUSES, EITHER THE OUTSIDE OR THE INSIDE, ON THE TOPS OF
14 TAXIS, IN BUS SHELTERS, IN SUBWAYS. THERE'S QUITE OF
15 VARIETY OF TRANSPORTATION MEDIA THAT PROVIDE AN OPPORTUNITY
16 FOR CIGARETTE ADVERTISING.

17 WHAT WE DON'T SEE IN THE MODERN ERA IS RADIO AND
18 TELEVISION ADVERTISEMENTS THAT ARE EXPLICITLY CIGARETTE
19 ADVERTISEMENTS. WE SEE SPONSORED EVENTS AND SIGNAGE AT
20 SPORTS STADIUMS FROM TIME TO TIME, BUT THE EXPLICIT USE OF
21 TELEVISION STOPPED IN THE EARLY 1970'S.

22 IN THE PERIOD OF THE '50S AND '60S, THAT WAS
23 COMMANDING THE BULK OF THE BUDGET. LIKE IN 1963, SOME 62
24 PERCENT OF THE BUDGET WENT TOWARD TELEVISION.

25 Q. CAN YOU GIVE US AN IDEA, WHEN YOU'RE TALKING
26 ABOUT 62 PERCENT OF A BUDGET, WHAT TYPES OF FIGURES WE'RE
27 TALKING ABOUT?

28 A. I DON'T REMEMBER THE FIGURE FOR '62. BUT AT THE
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0042

1 MOMENT, THE TOTAL PROMOTIONAL SPENDING FOR THE INDUSTRY IS
2 RUNNING AT ABOUT FIVE BILLION DOLLARS A YEAR.

3 MR. OHLEMEYER: EXCUSE ME, YOUR HONOR. MOVE TO
4 STRIKE. IRRELEVANT, NONRESPONSIVE TO THE QUESTION.

5 THE COURT: YOU MEAN IN TERMS OF TODAY?

6 MR. OHLEMEYER: CORRECT.

7 THE COURT: I'M GOING TO HAVE A VERY BRIEF
8 SIDEBAR WITH YOU ON THIS AREA. IT IS EASIER THAN THAT,
9 BECAUSE IT WASN'T RESPONSIVE TO THE QUESTION. SO I'M GOING
10 TO SUSTAIN THE OBJECTION AND STRIKE THE ANSWER. WE'LL SEE
11 WHETHER THIS BECOMES AN ISSUE OR NOT.

12 MS. CHABER: Q. IN TERMS OF THE 1960S AND
13 '70S, CAN YOU GIVE US AN IDEA OF WHAT THE TYPES OF -- THE
14 SIZE OF EXPENDITURES ON ADVERTISING BY THE CIGARETTE
15 INDUSTRY?

16 MR. OHLEMEYER: I OBJECT ON THE BASIS OF
17 RELEVANCE HERE, YOUR HONOR.

18 THE COURT: OKAY. THAT ONE, I'M GOING TO HAVE
19 TO HAVE A BRIEF SIDEBAR WITH YOU.

20 (COURT AND COUNSEL CONFER OUTSIDE
21 THE PRESENCE OF THE JURY)

22 THE COURT: FOR THE RECORD, YOU WANT TO WITHDRAW
23 THE QUESTION AND TO REPHRASE IT?

24 MS. CHABER: YES. I WILL WITHDRAW THAT.

25 Q. DR. POLLAY, IS IT FAIR TO SAY THAT THE CIGARETTE
26 INDUSTRY HAS SPENT BILLIONS OF DOLLARS ON ADVERTISING IN THE
27 LAST SEVERAL DECADES?

28 A. YES, IT IS.

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0043

1 Q. AND HOW DOES THAT COMPARE TO THE AMOUNT SPENT BY
2 OTHER INDUSTRIES WITH RESPECT TO ADVERTISING?

3 A. IT MAKES IT AMONG THE LARGEST ADVERTISING
4 INDUSTRIES THERE IS, UP WITH THE AUTOMOBILE INDUSTRY.

5 Q. NOW, WE TALKED A LITTLE BIT ABOUT TV. YOU HAD
6 MENTIONED TV. DURING THE 1950S AND 1960S, THE BEGINNING OF
7 THE 1970'S, WAS TV A MEDIUM THAT WAS USED FOR CIGARETTE
8 ADVERTISING?

9 A. IT WAS THE MEDIUM OF CHOICE OR PREFERENCE; THAT
10 IS, IT COMMANDED THE LION'S SHARE OF THE TOTAL BUDGET.

11 Q. ADS THAT WE SEE, ADVERTISEMENTS THAT WE SEE IN
12 EXHIBIT 19 THAT ARE FROM THE 1960S AND '70S WOULD BE
13 ADVERTISEMENTS THAT WERE IN ADDITION TO WHATEVER WAS BEING
14 PUT ON TELEVISION?

15 A. THAT'S CORRECT. AND THEY WOULD BE A PRINT FORM
16 OF THE SAME MESSAGE. THAT IS, WHEN DESIGNING A CAMPAIGN,
17 YOU DESIGN DIFFERENT EXECUTIONS FOR DIFFERENT MEDIA. YOU
18 ARE SAYING THE SAME THING, BUT YOU'RE HAVING TO DO IT IN
19 SLIGHTLY DIFFERENT WAYS WHEN YOU'RE DOING IT ON FILM AS
20 OPPOSED TO WHEN YOU'RE DOING IT ON A BILLBOARD OR DOING IT
21 ON A MAGAZINE PAGE.

22 Q. LET'S LOOK AT EXHIBIT 19-1 AND THEN IT RUNS A
23 THROUGH O. IS THAT CONSISTENT WITH HOW YOUR EXHIBIT BINDER
24 RUNS, WHICH IS THE EVIDENCE EXHIBIT BINDER?

25 A. YES. I ACTUALLY HAVE AN EXHIBIT P. THAT'S THE
26 ONE WE LOOKED AT BEFORE, THE MARLBORO SPORTS CALENDAR.

27 Q. OKAY. THAT MAY NOT HAVE MADE IT BACK INTO HERE.
28 NOW, YOU PICKED OUT THESE ADVERTISEMENTS FROM THE COLLECTION
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0044

1 THAT YOU ARE THE CURATOR OF AND DO RESEARCH ON. UNDER
2 CATEGORY 19-1, WHAT ARE THOSE ADS? IS THERE A GENERAL
3 MESSAGE THAT THEY RELATE TO?

4 A. THESE ARE ADS THAT USE CELEBRITY ENDORSERS AND/OR
5 ASSOCIATIONS WITH SPORTS AND ATHLETICISM. THAT IS, THERE
6 ARE OTHER CELEBRITIES, THAT IS CELEBRITIES OF STAGE AND
7 SCREEN AND SOME NEWSCASTERS EXAMPLED IN THIS SET. BUT
8 PRIMARILY, THEY ARE ATHLETES GIVING THEIR ENDORSEMENTS. AND
9 THEN IN THE LATER YEARS, THE PROMOTION OF CIGARETTES THROUGH
10 VARIOUS KINDS OF ASSOCIATION WITH SPORTING EVENTS.

11 Q. OKAY. AND LET'S JUST GO THROUGH THEM SOMEWHAT IN
12 SUCCESSION FROM A.

13 A. THIS IS A TESTIMONIAL BY JOHN CAMERON SWAYZE, WHO
14 WAS A VERY PROMINENT NEWSCASTER OF THE DAY AND HAD BEEN
15 PROMINENT ON RADIO BEFORE THIS ERA. THIS IS FROM THE EARLY
16 1950S. IN FACT, HIS NEWS SHOW WAS CALLED THE CAMEL NEWS
17 CARAVAN ON RADIO. AND IN THIS CASE, HE IS GIVING HIS
18 PERSONAL ENDORSEMENT AND IN ADDITION PRESENTING THE DATA
19 ABOUT CAMEL'S POPULARITY; THAT IS, BEING THE FIRST CHOICE OF
20 SMOKERS.

21 Q. AND THE FIRST CHOICE OF HIM, BY IMPLICATION?

22 A. BY IMPLICATION, YES.

23 Q. GENERALLY, THE ONES ON THE SPORTS FIGURES AND
24 CELEBRITIES IN TERMS OF THE PRINT MEDIA, DO YOU GENERALLY
25 SEE THEM ACTUALLY ENGAGING IN THE ACT OF SMOKING A
26 CIGARETTE?

27 A. NO. PARTICULARLY NOT IN THE LAST FEW DECADES.
28 BECAUSE WE DON'T SEE THE ACT OF SMOKING, AS WE DISCUSSED

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0045

1 EARLIER. BUT NO, IT'S ENOUGH JUST TO HAVE THE CELEBRITY
2 APPEAR IN THE IMAGE, IN THE AD ENDORSING THE PRODUCT BY

3 IMPLICATION. YOU DON'T HAVE TO SEE THE ACT OF SMOKING.
4 SOMETIMES YOU DO.

5 THE NEXT AD IS --

6 Q. SINCE YOU HAVE THE EXHIBIT NUMBERS ON THEM, WOULD
7 YOU JUST READ THEM OFF. IT WILL MAKE IT EASIER.

8 A. B. IT SHOWS RED BARBER, WHO IS A BASEBALL
9 ANNOUNCER, AND MANY OF HIS MAJOR LEAGUE FRIENDS. SO ALL OF
10 THE SMALLER PICTURES ARE BASEBALL STARS FROM THE PERIOD
11 AROUND 1950. BOB LEMON IS THE FIRST ONE, MICKEY MANTLE IS
12 THE SECOND ONE AND SO ON. AND THESE WERE ALL PEOPLE WHO
13 WERE -- YOU COULD SEE IN SOME OF THE PICTURES -- I SEE THEY
14 THERE ARE HOLDING CIGARETTES EITHER IN THEIR HANDS OR IN
15 THEIR MOUTH, IN MANY CASES. AND SO THESE ARE THE STARS OF
16 THE MAJOR LEAGUE WHO WERE CAMEL SMOKERS.

17 Q. WHAT IS THE IMPLICATION TO THE CONSUMER'S
18 EXPECTATION?

19 A. I THINK THIS IS A POWERFUL TYPE OF CELEBRITY
20 ENDORSEMENT, BECAUSE IF SOMEONE'S WHOLE CAREER AND INCOME
21 DEPENDS UPON THEIR ATHLETIC PERFORMANCE AND THEY ARE
22 COMFORTABLE SMOKING, THAT'S QUITE A STRONG ENDORSEMENT ON
23 BEHALF OF SMOKING.

24 Q. AND WHAT IS THE IMPLICATION WITH RESPECT TO THE
25 CONSUMER'S EXPECTATION OF THE SAFETY OF THE PRODUCTS?

26 A. THAT IF IT WON'T BE HARMFUL -- IF IT WON'T HARM
27 AN ATHLETE, IF IT WON'T PREVENT AN ATHLETE FROM ACHIEVING
28 HIS PEAK PERFORMANCE, IT CERTAINLY WON'T BOTHER AN AVERAGE

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1 PERSON.

2 Q. NEXT.

3 A. THE NEXT ONE IS SIMILAR IN THAT IT'S ALSO A
4 BASEBALL THEME FOR CHESTERFIELD. AND IT'S A BIT CUT OFF,
5 BUT WE CAN STILL SEE A NUMBER OF PEOPLE WE KNOW. FROM THE
6 TOP LEFT, THAT'S TED WILLIAMS, AND GOING CLOCKWISE, TED
7 WILLIAMS, STAN MUSIAL, JOE DIMAGGIO, THREE NAMES WE STILL
8 RECOGNIZE 40 YEARS, 45 YEARS LATER. AND THIS SAME CAMPAIGN
9 YOU CAN SEE IN THE NEXT VERSION, D, DIDN'T JUST FOCUS ON
10 BASEBALL STARS. THIS ONE SHOWS STARS FROM A VARIETY OF
11 SPORTS, BILLY (SIC) RIGGS IS A TENNIS PLAYER, OTHER FOOTBALL
12 PLAYERS AND BASKETBALL PLAYERS ARE SHOWN. SO ATHLETES
13 FOLLOWING ALL KINDS OF DIFFERENT ATHLETIC INTERESTS SHOWN AS
14 SMOKING CHESTERFIELD.

15 AND INDEED, THEY DIDN'T FOCUS JUST ON SPORTS
16 STARS. THEY ALSO USED CELEBRITIES OF STAGE AND SCREEN.

17 Q. BUT WITH RESPECT TO THE SPORTS STARS, WOULD YOU
18 AGREE THAT THE EXPECTATION OF THE CONSUMER REGARDING THE
19 SAFETY OF THE PRODUCT RELATES TO THE ATHLETICISM OF THE
20 PEOPLE SHOWN?

21 MR. OHLEMAYER: I OBJECT TO THAT AS LEADING.

22 THE COURT: OVERRULED.

23 THE WITNESS: YES. AS I SAID BEFORE, I THINK
24 THIS IS AN EVEN STRONGER ENDORSEMENT TO HAVE AN ATHLETE'S
25 ENDORSEMENT THAN IT IS TO HAVE A MOVIE STAR'S ENDORSEMENT.
26 I MEAN, IT'S ALWAYS HELPFUL TO HAVE A CELEBRITY'S
27 ENDORSEMENT. TO HAVE AN ATHLETE'S ENDORSEMENT ADDS THAT
28 ATHLETICISM DIMENSION TO IT.

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0047

1 MS. CHABER: Q. THE CONSUMER EXPECTATION WITH
2 RESPECT TO AN AD SUCH AS THAT WITH THE ATHLETE IN IT, WOULD
3 YOU THINK THAT IT WOULD BE OF SHORTNESS OF BREATH OR LUNG
4 CANCER?

5 A. NO. IN FACT, I THINK THE EXPECTATION THAT THE AD

6 ENCOURAGES ESSENTIALLY NO SYMPTOMS WHATSOEVER. THAT AGAIN,
7 IF IT WOULDN'T IMPEDE AN ATHLETE FROM ACHIEVING PEAK
8 PERFORMANCE UPON WHICH HIS INCOME DEPENDS, IT WOULDN'T BE A
9 PROBLEM FOR THE AVERAGE MAN ON THE STREET OR WOMAN ON THE
10 STREET TO JUST CARRYING OUT NORMAL LIFE.

11 Q. THE NEXT ONE IS?

12 A. THE NEXT ONE IS JOE DIMAGGIO, THE PHOTOS OF HIS
13 POWER AND SWING. AND UNFORTUNATELY, THE COPY IS A BIT
14 FADED, IT'S A BIT HARD TO SEE. THIS USES THIS KIND OF TIME
15 LAPSE PHOTOGRAPHY TO CAPTURE HIS SWING AND DO A LITTLE
16 ANALYSIS OF IT AND THE COPY TALKS ABOUT MILDNESS. YOU CAN
17 SEE THE BOLD STANDS OUT THERE, "MILDNESS" DOWN AT THE BOTTOM
18 NEXT TO IT AND "28 PERCENT LESS NICOTINE" ON THE OTHER SIDE.

19 Q. OKAY. THERE'S ACTUALLY OTHER TEXT THERE --

20 A. YES.

21 Q. -- BUT ONLY THE BOLDED THINGS ARE WHAT WE'RE ABLE
22 TO SEE?

23 A. YES. THE NEXT ONE, WE'VE ALREADY SEEN. THAT WAS
24 THE JOHN WAYNE, JOAN CRAWFORD, DICK POWELL, "NOT ONE SINGLE
25 CASE OF THROAT IRRITATION."

26 THERE IS YET ANOTHER ONE OF JOHN WAYNE AS A CAMEL
27 FAN FOR 24 YEARS SHOWN RELAXING ON HIS FRONT PORCH
28 APPARENTLY AND HE IS LEANING BACK ON A CHAIR. AND HERE THE
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1 TALK ABOUT THIS IS BOTH -- IF YOU SEE DOWN AT THE BOTTOM,
2 THAT "CAMELS FIRST IN SALES." ITS POPULARITY IS THE PRIMARY
3 APPEAL, THAT IS MOST OTHER PEOPLE ARE SMOKING CAMELS. SO
4 PRESUMABLY YOU CAN TRUST IT, BECAUSE OTHER PEOPLE DO.

5 AND THEN THE SUBAPPEAL UNDERNEATH THE CIGARETTE
6 PACK, NOT LEGIBLE TOO WELL THERE, IT SAYS "FOR MILDNESS, FOR
7 FLAVOR, CAMELS AGREE WITH MORE PEOPLE THAN ANY OTHER
8 CIGARETTE." SO THE MILDNESS AND AGREEABILITY OF THE PRODUCT
9 IS ALSO MENTIONED IN THE AD.

10 Q. SOME OF THESE ADS HAVE MORE THAN ONE MESSAGE THAT
11 THEY'RE DELIVERING WITH RESPECT TO HEALTH OR POPULARITY,
12 THINGS LIKE THAT?

13 A. YES. WE WOULD REFER TO THAT AS PRIMARY AND
14 SECONDARY APPEALS. IN THE OLD DAYS IN PARTICULAR,
15 ADVERTISING TENDED TO HAVE MULTIPLE APPEALS. YOU MIGHT BE
16 GIVEN MANY DIFFERENT REASONS WHY YOU SHOULD PREFER A
17 PARTICULAR PRODUCT OR BRAND AND TRY IT. THESE DAYS, ADS
18 TEND TO BE SIMPLIFIED AND ARE MORE FOCUSED ON A SINGLE-
19 MINDED IDEA.

20 Q. NEXT.

21 A. THE NEXT IS MICKEY MANTLE GIVING HIS ENDORSEMENT
22 FOR VICEROYS.

23 Q. HE'S IDENTIFIED AS THE HOME RUN CHAMPION?

24 A. YES. MICKEY MANTLE, LIKE MARK MCGUIRE, WAS THE
25 HOME RUN CHAMPION, ALTHOUGH AS HISTORY HAS IT, HE DIDN'T
26 HOLD THE TITLE FOR LONG, BECAUSE ROGER MARIS SHORTLY
27 THEREAFTER TOOK THE TITLE AWAY FROM HIM. SO HE WAS A
28 FAMOUS -- VERY FAMOUS ATHLETE, AS MARK MCGUIRE IS NOW.

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1 THE NEXT ONE IS ROGER MARIS, AS WE SPEAK OF HIM,
2 ALSO ENDORSING CAMELS. AND IN CASE YOU DON'T KNOW WHO ROGER
3 MARIS WAS, IT SAYS HE'S A NEW YORK YANKEE, JUST TO
4 UNDERSCORE THAT POINT, AND IT SHOWS -- AT THE VERY TOP, IT
5 SHOWS HIS GRIP ON THE BASEBALL BAT AND MAKES A REFERENCE TO
6 "REACHING FOR THE RECORD BOOKS."

7 Q. NEXT.

8 A. LEST WE GIVE THE IMPRESSION THAT BASEBALL WAS THE

9 PRIMARY SPORT, BASEBALL WAS VERY POPULAR BECAUSE OF THE
10 SPONSORSHIP OF BASEBALL GAMES BY THE CIGARETTE COMPANIES,
11 BUT THERE WERE OTHER ATHLETES IN OTHER SPORTS ALSO USED, AND
12 SOME OF THE OTHER SPORTS ARE SHOWN IN SOME OF THE REMAINING
13 EXAMPLES.

14 Q. HERE WE HAVE BASKETBALL.
15 (A TELEPHONE RINGS)

16 A. I'M TEMPTED TO ANSWER THE PHONE. THIS IS BOB
17 COUSY, WHO WAS THE STAR AND LEAD OF THE BOSTON CELTICS TEAM
18 DURING THEIR REIGN. THEY WERE THE NATIONAL CHAMPION NBA
19 TEAM FOR SEVERAL YEARS CONSECUTIVELY, AND HE WAS THE STAR OF
20 THAT TEAM. AND HERE HE IS ENDORSING KENT WITH ITS MICRONITE
21 FILTER.

22 Q. OKAY.

23 A. THIS IS ANOTHER EXAMPLE OF KENT ADVERTISING WE
24 LOOKED AT EARLIER. HERE IS YET ANOTHER WAY OF COMMUNICATING
25 HEALTHINESS, USING THE ATHLETE'S ENDORSEMENT. AND THE
26 HEADLINE AT THE TOP SAYS "MORE SCIENTISTS AND EDUCATORS
27 SMOKE KENT." SO PEOPLE IN THE KNOW, PEOPLE WITH KNOWLEDGE
28 AND WHO HAVE PRESUMABLY STUDIED THE TOPIC, ATHLETES WHO HAVE
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1 HAD THE OPPORTUNITY TO STUDY THE TOPIC SMOKE KENT. THE
2 PICTURES SHOW THESE ATHLETES SMOKING KENT.

3 SO THERE'S KIND OF AT LEAST TWO COMPELLING TYPES
4 OF ENDORSEMENTS TO SUGGEST THAT KENT MIGHT BE A SAFE
5 CIGARETTE.

6 THE NEXT ONE, K, IS FOOTBALL STAR NORM VAN
7 BROCKLIN OF THE L.A. RAMS.

8 Q. DO WE DATE OURSELVES IF WE KNOW WHO THESE PEOPLE
9 ARE?

10 A. I DATE MYSELF ALL THE TIME. YES. YOU CAN EVEN
11 SEE THE OLD HELMET, QUITE A COLLECTOR'S ITEM THESE DAYS, THE
12 RAM'S HELMET. HERE, THE REFERENCE IS TO VICEROY FILTERTIPS
13 AND ITS 20,000 FILTERS, "TWICE AS MANY FILTERS AS THE OTHER
14 TWO LARGEST SELLING FILTERED BRANDS."

15 AND AT THE BOTTOM, THERE IS A COMPARISON OF
16 VICEROY VERSUS UNNAMED COMPARISON BRANDS, BRAND B AND BRAND
17 C.

18 Q. WOULD THIS AD THEN BE AN EXAMPLE OF BOTH THE
19 SPORTS CELEBRITY ENDORSEMENT AS WELL AS AN IMPLIED HEALTH
20 CLAIM?

21 A. YES. BECAUSE FILTERS ARE THERE FOR HEALTH
22 REASONS. THEY WERE INTRODUCED IN RESPONSE TO THE HEALTH
23 ISSUES. THE FILTER THAT'S GOT TWICE AS MANY FILTERS IS
24 PRESUMABLY TWICE AS EFFECTIVE AS THE COMPETITOR PRODUCTS.

25 Q. OKAY.

26 A. THE NEXT ONE IS SPONSORSHIP OF SOCCER, THE WORLD
27 CUP, BY WINSTON. AND WE'RE GETTING INTO THE MORE MODERN ERA
28 WHERE NOW INSTEAD OF USING NAMED CELEBRITIES GIVING

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1 ENDORSEMENTS, NOW WHAT IS HAPPENING IS THE SPONSORSHIP OF
2 EVENTS OR TEAMS OR THE PLACEMENT OF SIGNAGE IN STADIUMS SO
3 THAT THE TELEVISION CAMERAS PICK THEM UP, ACTIVITIES LIKE
4 THAT TO ASSOCIATE THE CIGARETTE BRANDS WITH THE ATHLETICISM
5 BUT WITHOUT USING PAID CELEBRITY ENDORSEMENTS. SO THIS
6 IS --

7 Q. YOU ARE TALKING ABOUT THE RELATIONSHIP --

8 A. THIS IS SPONSORSHIP OF AMERICA'S NATIONAL SOCCER
9 TEAM GOING FOR THE WORLD CUP.

10 THE NEXT ONE IS THE -- IN FACT, THE NEXT TWO ARE
11 BOTH NEWPORT ASSOCIATING ITSELF WITH SKIING THROUGH

12 PROMOTIONAL EVENTS WHERE YOU COULD GET -- THE FIRST ONE IS A
13 SPECIAL SKI OFFER. YOU COULD GET COUPONS THAT WILL BE GOOD
14 FOR SKI LIFT TICKETS. SO AGAIN, THE IDEA HERE IS THAT
15 NEWPORT SMOKERS ARE PEOPLE LEADING HEALTHY LIFE-STYLES,
16 THEY'RE OUT THERE IN THE FRESH AIR SKIING AWAY AND THAT'S A
17 CHARACTERISTIC OF NEWPORT SMOKERS. AND IF THEY'RE NOT
18 CONCERNED, WHY SHOULD YOU BE CONCERNED?

19 Q. AND THE SPORTS ADVERTISING PICKS SPORTS WHERE
20 PEOPLE NEED GOOD BREATH AND ABILITY TO SUSTAIN ACTIVITY FOR
21 LONG PERIODS OF TIME?

22 A. IT CERTAINLY TENDS TOWARD AEROBIC ACTIVITIES,
23 ALTHOUGH IT ALSO IN THE MODERN ERA TENDS TOWARD RISK-TAKING
24 ACTIVITIES. SO WE SEE IN THE MODERN ERA SPONSORSHIP OF RACE
25 CAR DRIVERS. I WOULDN'T CALL THAT NECESSARILY AEROBIC.
26 IT'S VERY DEMANDING PHYSICALLY, BUT NOT NECESSARILY ON YOUR
27 LUNGS. BUT THERE WHAT IS IMPORTANT IS THAT YOU ARE BEING
28 REWARDED FOR YOUR RISK TAKING.

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1 Q. BUT IN THE '50S, '60S, '70S, IT WAS GENERALLY AN
2 ACTIVITY THAT REQUIRED GOOD BREATH AND AEROBIC ACTIVITY?

3 A. YES, THAT'S CORRECT.

4 Q. AND AGAIN, THIS WAS THE SECOND NEWPORT SKI AD.

5 A. I THINK THAT'S GENERALLY THE POINT OF SPONSORING
6 ATHLETICISM.

7 MR. OHLEMEYER: EXCUSE ME, YOUR HONOR. THERE IS
8 NO QUESTION PENDING.

9 THE COURT: THERE IS NO QUESTION PENDING. I
10 AGREE.

11 MS. CHABER: Q. WHAT WOULD BE THE POINT WITH
12 RESPECT TO THE IMPRESSION THAT THE CONSUMER IS GOING TO GET
13 OF A CIGARETTE COMPANY SPONSORING AN ACTIVITY SUCH AS A
14 SKIING EVENT?

15 MR. OHLEMEYER: I OBJECT TO THE QUESTION AS
16 PHRASED, YOUR HONOR.

17 THE COURT: HE'S OBJECTING TO THE WORD "POINT."
18 WHY DON'T YOU JUST REPHRASE IT.

19 MS. CHABER: Q. WHAT WOULD BE THE POTENTIAL
20 EFFECT ON THE CONSUMER OF A CIGARETTE COMPANY SPONSORING A
21 SPORTS EVENTS SUCH AS SKIING?

22 A. THAT IT WOULD LEAD CONSUMERS TO SEE SMOKING AS
23 PERFECTLY CONSISTENT WITH A HEALTHY LIFE-STYLE.

24 Q. AND THEN THE LAST ONE IN THIS SECTION IS THE
25 MARLBORO SPORTS CALENDAR?

26 A. YES. AND THERE'S ACTUALLY TWO PAGES OF THAT. WE
27 HAVE THAT PAGE WHICH WE HAVE SEEN AND THEN THERE'S ANOTHER
28 PAGE THAT JUST PROVIDES THE DETAIL OF VARIOUS EVENTS.

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1 AGAIN, THE SAME IDEA IS AT WORK HERE, JUST KEEPING THE BRAND
2 VISIBLE IN ASSOCIATION OR PAIRED LINKAGE WITH THE VARIOUS
3 KINDS OF SPORTING EVENTS.

4 Q. I WANT TO ASK YOU ABOUT SOMETHING THAT APPEARS IN
5 THIS AD RIGHT HERE (INDICATING), AND THAT'S THIS RED
6 CHEVRON, I GUESS YOU'D CALL IT?

7 A. YES, SOMETIMES ALSO KNOWN AS THE TENT.

8 Q. THE TENT?

9 A. YES.

10 Q. WHAT IS THAT? IS THERE SOME TERM OF ART THAT'S
11 USED FOR THAT TYPE OF IMAGE?

12 A. WELL, THAT TYPE OF IMAGE WOULD BE REFERRED TO AS
13 A LOGO, GENERALLY. WHAT THAT SHAPE IS IS THE CHARACTERISTIC
14 SHAPE OF RED AS IT APPEARS ON THE MARLBORO PACKAGE. SO THAT

15 THAT IS -- THAT ALONE, EVEN WITHOUT SAYING THE WORD
16 "MARLBORO," WOULD FOR MANY PEOPLE BE REMINISCENT OF THE
17 MARLBORO PACKAGE, WOULD REMIND PEOPLE OF MARLBORO.

18 Q. SO THERE IT'S POSSIBLE THEN TO PUT UP THOSE
19 COLORS IN THAT SHAPE WITHOUT ANY WORDS AND THE POTENTIAL
20 EFFECT ON A CONSUMER IS THAT THEY THINK MARLBORO?

21 A. INDEED, SOME OF THE MODERN MARLBORO ADVERTISING
22 DOES EXACTLY THAT. IT DOESN'T USE THE FULL WORD. IT USES
23 IS ONLY PART OF THE WORD "MARLBORO."

24 Q. NOW, SOME OF THESE TOOK US UP TO MODERN TIMES,
25 BUT OTHERS STARTED IN THE EARLY 1950S IN THIS SECTION?

26 A. YES. WHAT HAPPENED IS AFTER WE PULLED A VARIETY
27 OF ADS, IT WAS OBVIOUSLY A FAIRLY THICK BUNDLE. SO I SIMPLY
28 SORTED THEM BY VARIOUS TOPICS. SO ONE TOPIC THAT I SORTED

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1 IT INTO WAS THIS TOPIC OF ENDORSEMENTS AND ASSOCIATION WITH
2 SPORTS AND THEN THE OTHER, YOU KNOW, THERE ARE OTHER TOPICS
3 FOR THE OTHER PILES.

4 Q. I WANT YOU TO ASSUME A CONSUMER GROWING UP IN THE
5 1950S WHO TURNS FOUR IN 1950. DOES THIS HAVE ANY BEARING ON
6 WHAT THAT PERSON'S ULTIMATE EXPECTATION IS GOING TO BE?

7 A. SURE.

8 MR. OHLEMEYER: YOUR HONOR, I OBJECT TO THE
9 QUESTION AS FRAMED BECAUSE IT ASKS FOR THE EFFECT ON AN
10 INDIVIDUAL AS OPPOSED TO A GROUP.

11 THE COURT: ALL RIGHT. I'LL SUSTAIN.

12 MS. CHABER: Q. LET'S ASSUME CONSUMERS WHO ARE
13 TURNING FOUR YEARS OLD IN THE YEAR 1950. THESE
14 ADVERTISEMENTS THAT WE'VE SEEN THAT ARE THROUGH THE TIME
15 PERIOD OF THE 1950S AND THE 1960S AND THE 1970'S WHERE THERE
16 ARE ACTUAL CELEBRITY SPORTS ENDORSEMENTS, IS THAT LIKELY TO
17 HAVE AN EFFECT ON THOSE CONSUMERS IN THAT AGE BRACKET?

18 A. CERTAINLY IT WOULD SUGGEST TO THEM THAT, FIRST OF
19 ALL, MANY PEOPLE SMOKE, INCLUDING MANY ATHLETES, AND THAT
20 THE ATHLETES ARE PERFECTLY COMFORTABLE WITH THE FACT OF
21 SMOKING, INCLUDING VERY FAMOUS ATHLETES.

22 Q. AND IS THERE ANY EVIDENCE OR RESEARCH THAT'S BEEN
23 DONE THAT HAVE LOOKED AT WHETHER CHILDREN OF THAT AGE LEVEL,
24 FOUR, FIVE, SIX, SEVEN, THAT ARE AFFECTED BY THIS TYPE OF
25 ADVERTISING?

26 A. CHILDREN AT A QUITE YOUNG AGE ARE QUITE
27 RESPONSIVE TO ADVERTISING. THAT IS PART OF THE ENVIRONMENT
28 THEY'RE ALERT TO AS THEY GROW UP. AND I THINK IN THIS ERA,

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1 IT WOULD HAVE BEEN WHAT THEY SAW ON TELEVISION PROBABLY;
2 THAT IS, THESE SAME CAMPAIGNS AS THEY MANIFESTED THEMSELVES
3 ON TELEVISION WHERE THE CHILDREN WOULD HAVE SEEN THEM.

4 THEY'D BE LESS LIKELY TO BE READING THE MAGAZINES
5 AT THOSE YOUNGER AGES, BUT THEY WOULD CERTAINLY BE AWARE OF
6 THE ADVERTISEMENTS. THEY'D CERTAINLY SEE THINGS AS THEY
7 CAME AND WENT TO THE CORNER STORE, THE CONVENIENCE STORE FOR
8 BREAD AND MILK, IF THEY WERE SENT FOR THOSE KINDS OF CHORES
9 AS A YOUNG CHILD. I BELIEVE, BECAUSE IT WAS A HEAVILY
10 ADVERTISED PRODUCT, THEY WOULD SEE THAT. IT IS JUST PART OF
11 THE CULTURE THEY WERE GROWING UP IN.

12 Q. AND AFTER LUNCH, WE'LL TAKE A LOOK AT SOME OF THE
13 COMMERCIAL ADVERTISING ON TV THAT YOU'RE DISCUSSING. I WANT
14 TO SEE IF I CAN COMPLETE ANOTHER SECTION BEFORE WE BREAK FOR
15 LUNCH. EXHIBIT 19-2, WHICH RUNS FROM A THROUGH R.

16 A. YES.

17 Q. GOOD. WHAT IS THIS SECTION REPRESENTATIVE OF?

18 A. THIS IS REPRESENTATIVE OF THE STYLE OF
19 ADVERTISING WE FIRST TALKED ABOUT; THAT IS, THOSE ADS WHICH
20 WERE VERY EXPLICIT IN THEIR HEALTH REASSURANCES AND
21 PARTICULARLY THOSE WHICH WERE INTRODUCING FILTERS TO THE
22 CONSUMING PUBLIC. THAT IS, WE'RE EXPLAINING THE LOGIC FOR
23 FILTERED PRODUCTS. IT INCLUDES A FEW THAT PREDATE THE
24 FILTER ERA. THAT SHOWS THAT THIS KIND OF HEALTH REASSURANCE
25 IS ACTUALLY A TIME-HONORED TRADITION IN THIS INDUSTRY.

26 MR. OHLEMEYER: OBJECTION, YOUR HONOR. MOTION
27 TO STRIKE.

28 THE COURT: ON WHAT?
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1 MR. OHLEMEYER: THE WITNESS' OPINION ABOUT TIME-
2 HONORED TRADITIONS.

3 THE COURT: ALL RIGHT. I'LL STRIKE JUST THAT
4 REFERENCE, BUT I'LL LEAVE IN THE REMAINDER OF THE ANSWER.

5 MS. CHABER: OKAY.

6 Q. LET'S TAKE A LOOK AT THEM SEQUENTIALLY.

7 A. OKAY. THIS IS AMERICAN TOBACCO'S BRAND LUCKY
8 STRIKE WITH THE HEADLINE THAT SAYS "20,679 PHYSICIANS SAY
9 LUCKIES ARE LESS IRRITATING." AND AT THE VERY BOTTOM, IT
10 ALSO SAYS "YOUR THROAT PROTECTION AGAINST IRRITATION,
11 AGAINST COUGH."

12 SO AGAIN, IT'S A HEALTH PROMISE AND THE SPECIFIC
13 HEALTH CONCERN IS COUGH OR THROAT IRRITATION. IN ADDITION
14 TO THAT, THE PICTURE SHOWS A YOUNG WOMAN SMOKING. THIS
15 DATES FROM ABOUT 1929, I BELIEVE, AND THAT WOULD HAVE BEEN A
16 TOUCH SCANDALOUS IN THOSE DAYS. THAT IS, WOMEN WEREN'T --
17 THERE WEREN'T MANY WOMEN SMOKING AND THEY WEREN'T DIRECTLY
18 BEING ADVERTISED TO. SO AS VIEWED IN THOSE DAYS, THIS WAS A
19 BIT BOLD.

20 Q. OKAY.

21 A. THE NEXT ONE --

22 Q. I JUST WANTED TO NOTE IT SAYS IN WHAT LOOKS LIKE
23 AN APPARENT QUOTE FROM HER "I TOO PREFER LUCKIES"?

24 A. YES. AND THEN THE TEXT BENEATH THAT SAYS
25 "TOASTING REMOVES DANGEROUS IRRITANTS THAT CAUSE THROAT
26 IRRITATION AND COUGHING." SO THIS NOTION THAT IRRITATION IS
27 SEEN IN THE HEADLINES, SEEN IN THAT LITTLE COPY, THAT
28 PRESUMABLY IS HER SENTIMENT, AND THEN ALSO SEEN AT THE

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1 BOTTOM UNDERNEATH THE SLOGAN ABOUT PROTECTION AND
2 IRRITATION.

3 Q. AND DOCTORS ARE BEING SAID TO PREFER THAT BRAND;
4 IS THAT CORRECT?

5 A. YES. AS CLAIMING THAT LUCKIES ARE LESS
6 IRRITATING.

7 Q. NOW, LUCKIES WAS NOT THE ONLY ONE THAT MADE
8 CLAIMS ABOUT DOCTORS EITHER ENDORSING OR PREFERRING THEIR
9 BRAND; IS THAT CORRECT?

10 A. NO, NOT AT ALL. THERE WERE MANY SUCH CAMPAIGNS
11 OVER THE YEARS. HERE'S ONE FOR THE PHILIP MORRIS BRAND THAT
12 AGAIN TALKS ABOUT IRRITATION OF NOSE AND THROAT. AND THE
13 COPY NEXT TO JOHNNY, THE PAGE BOY, SAYS "EACH DOCTOR KEPT A
14 RECORD OF EACH CASE AND THE FINAL RESULTS PUBLISHED IN
15 AUTHORITATIVE MEDICAL JOURNALS PROVED CONCLUSIVELY THAT WHEN
16 SMOKERS CHANGED TO PHILIP MORRIS, EVERY CASE OF IRRITATION
17 CLEARED COMPLETELY OR DEFINITELY IMPROVED."

18 SO AGAIN, THE NOTION HERE IS THAT TO THE EXTENT
19 THAT ANYONE EXPERIENCED IRRITATION, IF YOU SWITCH TO THIS
20 BRAND, THAT WILL GO AWAY OR BE ALLEVIATED.

21 Q. AND THEN YOU SEE THE "CALL FOR PHILIP MORRIS" ON
22 THE BOTTOM. IS THAT SOMETHING THAT WAS THEN REPEATED IN THE
23 TV COMMERCIALS?

24 A. THAT WAS ESSENTIALLY SUNG. THIS CHARACTER, THIS
25 HOTEL PAGE BOY, JOHNNY ROVENTINI, HAD A VERY PIERCING
26 VOICE. HE DIDN'T NEED ANY MICROPHONE. HE COULD BE HEARD
27 OVER A LARGE CROWD AND HE WOULD ON RADIO CHANT THIS "CALL
28 FOR PHILIP MORRIS. CALL FOR PHILIP MORRIS."

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1 Q. I WON'T MAKE YOU DO IT, BECAUSE I THINK IT'S ON
2 THE VIDEO.

3 A. I COULDN'T IMITATE THE UNIQUENESS OF HIS VOICE.

4 Q. AND THE NEXT ONE?

5 A. YES. HERE THE LARGE PRINT MAKES REFERENCE TO AN
6 OUNCE OF PREVENTION BEING WORTH A BOUND OF CURE IN THIS AD
7 FOR PHILIP MORRIS. AND THEN IT GOES ON TO SAY "PHILIP
8 MORRIS ARE SCIENTIFICALLY PROVED FAR LESS IRRITATING TO THE
9 NOSE AND THROAT." ALTHOUGH IT IS CURIOUS TO NOTE THAT THE
10 FINER PRINT AT THE TOP WHERE YOU WOULD READ IT LIKE IT
11 WAS A PARAGRAPH IN A TEXTBOOK DOES START OFF WITH THE
12 DISCLAIMER -- NO, HIGHER UP THAN THAT (INDICATING) -- THAT
13 "NO CURATIVE POWER IS CLAIMED FOR PHILIP MORRIS...BUT," AND
14 THEN IN BOLD HEADLINES THIS IS "AN OUNCE OF PREVENTION."

15 Q. THIS IS A MIXED MESSAGE THAT'S BEING SENT?

16 A. WELL, THE BIG HEADLINE MAKES THE BIG PROMISE AND
17 THE SMALLER HEADLINE SORT OF TAKES IT AWAY. I EXPECT IN
18 LEGAL TERMS, MAYBE IT DOES TAKE IT AWAY. IN TERMS OF
19 CONSUMER EXPECTATIONS, I DON'T THINK IT DOES MUCH TO TAKE IT
20 AWAY.

21 Q. AND WHEN YOU GET TO THE VERY BOTTOM OF THE AD AND
22 IT SAYS "FAR FINER FLAVOR - PLUS FAR MORE PROTECTION," WHAT
23 IS THE ULTIMATE EFFECT ON THE CONSUMER WHEN THEY CONSIDERED
24 "WELL, THEY'RE NOT MAKING A CLAIM BUT THIS IS AN OUNCE OF
25 PREVENTION AND WE'RE TALKING ABOUT MORE PROTECTION:

26 A. WELL, IF THE CONSUMER READ THE FIRST PART SAYING
27 ABOUT "NO CURATIVE POWER" IS CLAIMED, THEY MIGHT BE
28 CONFUSED, BECAUSE THE REST OF IT TALKS ABOUT PREVENTION AND

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1 PROTECTION AND SCIENTIFIC PROOF AND LESS IRRITATING. SO I
2 THINK THE FUNDAMENTAL MESSAGE THAT WOULD BE RECEIVED BY
3 ALMOST ALL CONSUMERS IS THERE'S SOMETHING ABOUT PHILIP
4 MORRIS THAT OFFERS PROTECTION, PREVENTION.

5 Q. THE NEXT ONE?

6 THE COURT: IS THIS A GOOD POINT?

7 MS. CHABER: CAN WE DO JUST ONE MORE AND THEN
8 BREAK?

9 THE COURT: YES.

10 THE WITNESS: THE NEXT ONE IS PERHAPS THE BEST
11 KNOWN CAMPAIGN OF THIS TYPE. THE CAMEL CAMPAIGN OF THE
12 POST-WAR PERIOD STARTING IN 1946. "MORE DOCTORS SMOKE
13 CAMELS THAN ANY OTHER CIGARETTE," AND A VARIETY OF DOCTORS
14 SHOWN IN THE IMAGES. THIS CAMPAIGN RAN FOR MANY YEARS AND
15 ULTIMATELY LED TO THAT T-ZONE CAMPAIGN WE SEE WITH JOHN
16 WAYNE.

17 THE T-ZONE -- IF LOOK DOWN AT THE BOTTOM OF THIS
18 AD, YOU WILL SEE ALREADY THE T-ZONE IS BEING INTRODUCED
19 HERE. SO THE DOCTORS ARE SMOKING CAMELS. AND I THINK
20 THERE'S TWO LEVELS OF MESSAGES THE CONSUMER RECEIVES HERE.
21 ONE IS JUST THAT DOCTORS ARE SMOKING, AND THAT'S AN
22 IMPORTANT MESSAGE. AND THEN SECONDLY, THAT THEIR BRAND OF
23 PREFERENCE IS CAMELS.

24 MS. CHABER: Q. AND INDEED, IT WAS COMMON FOR
25 DOCTORS TO SMOKE IN THE '40S, '50S, '60S, AND INTO THE '70S?
26 A. IT WAS.
27 MS. CHABER: I THINK THIS WOULD BE A GOOD TIME,
28 YOUR HONOR.

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0060

1 THE COURT: OKAY. JURORS, OVER THE NOON HOUR,
2 PLEASE CONTINUE TO FOLLOW ADMONITION. AS YOU KNOW, IT'S
3 CRITICAL THAT YOU DO SO. HAVE A GOOD LUNCH AND WE'LL SEE
4 YOU ALL BACK AT 1:30.
5 (LUNCH RECESS TAKEN AT 12:02 P.M.)
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JUDITH ANN OSSA, CSR NO. 2310

0061

1 AFTERNOON SESSION 1:45 P.M.
2 MONDAY, JANUARY 11, 1999
3 THE COURT: WHILE COUNSEL ARE DEALING WITH
4 PROBLEMS OF MODERN TECHNOLOGY HERE, LET ME JUST SAY I GOT A
5 NOTE FROM MR. VACARRO AND I APPRECIATE WHAT YOU'VE DONE.
6 YOU'VE SCHEDULED YOUR DOCTOR'S APPOINTMENT NEXT TUESDAY
7 MORNING AND YOU ANTICIPATE THAT YOU WILL BE HERE BY 10:00
8 O'CLOCK.
9 THAT'S FINE. UNLESS YOU CHANGE THAT APPOINTMENT,
10 ASSUMING IT CONTINUES, WE'LL START AT 10:00 O'CLOCK.
11 ACTUALLY, WE HAVE MONDAY OFF ANYWAY. REMEMBER, THAT'S
12 MARTIN LUTHER KING DAY. SO WE'LL HAVE A PRETTY GOOD, LONG
13 WEEKEND. WE'LL START AT 10:00 O'CLOCK ON TUESDAY.
14 IF FOR ANY REASON I SHOULD SAY "BE HERE AT 9:00
15 OR 9:30," PLEASE RAISE YOUR HAND AND REMIND ME. I'M
16 INTENDING TO MAKE IT POSSIBLE FOR YOU TO GO. IF I SAY THAT,
17 IT WILL ONLY BE BECAUSE IT SLIPPED MY MIND. GIVE ME A HEADS
18 UP IF I MAKE A MISTAKE.
19 HAVE WE SOLVED THE TECHNOLOGICAL PROBLEMS?
20 MS. CHABER: I THINK WE'VE SOLVED THE
21 TECHNOLOGICAL PROBLEM. I DON'T KNOW THAT WE'VE SOLVED MY
22 SPACE PROBLEM HERE, BUT I THINK WE'RE ON OUR WAY.
23 THE COURT: TAKE YOUR TIME AND LET US KNOW WHEN
24 YOU'RE READY TO GO.
25 MS. CHABER: OKAY.
26 THE COURT: OKAY. YOU MAY PROCEED.

27 MS. CHABER: THANK YOU, YOUR HONOR.
28

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0062

1 CONTINUED DIRECT EXAMINATION

2 BY MS. CHABER: Q. DR. POLLAY, BEFORE WE --
3 WE'RE GOING TO NEED TO DIM THE LIGHTS AGAIN, PLEASE --
4 BEFORE WE BROKE FOR LUNCH, WE WERE DEALING WITH
5 ADVERTISEMENTS THAT DEALT WITH HEALTH AND DOCTORS AND
6 FILTERS. AND I THINK WE LOOKED AT A NUMBER OF THEM BUT HAD
7 NOT COMPLETED ALL OF THEM.

8 WITHOUT HAVING TO PUT EVERY SINGLE ONE UP THERE,
9 THIS IS A DOCUMENT, THAT IS A BINDER THAT'S IN EVIDENCE,
10 EXHIBIT 19. COULD YOU GIVE US AN IDEA OF WHAT THE OTHER ADS
11 WERE THAT YOU'VE USED AS REPRESENTATIVE FOR HEALTH.

12 A. IN THE SECTION 19-2, THERE ARE OTHER ADS OF THE
13 CHARACTER WE SAW; THAT IS, THE DOCTORS ENDORSING AND
14 RECOMMENDING WITH HEADLINES LIKE "EMBASSY BRAND. INHALE TO
15 YOUR HEART'S CONTENT."

16 WE'VE ALREADY SEEN AND TALKED ABOUT THE KENT AD,
17 THE IMPLIED ENDORSEMENT OF THE AMERICAN MEDICAL
18 ASSOCIATION. ANOTHER AD ON THEIRS SAID "THE DIFFERENCE IN
19 THE PRICES IS A FEW PENNIES BUT THE DIFFERENCE IN PROTECTION
20 IS PRICELESS." THERE ON THE SCREEN IS THE "INHALE TO YOUR
21 HEART'S CONTENT" FOR EMBASSY.

22 IF WE GO TO J, WE HAVE THE L&M PRODUCT, WHICH WAS
23 ANOTHER ONE OF THE PIONEERING FILTER PRODUCTS, USED THE
24 SLOGAN "JUST WHAT THE DOCTOR ORDERED." AND THERE'S A LETTER
25 YOU CAN SEE REPRODUCED THERE, A LETTER FROM DR. DARKIS, THE
26 RESEARCH DIRECTOR OF LIGGETT & MYERS.

27 THE NEXT EXAMPLE OF K IS TWO DIFFERENT VICEROY
28 ADS ALSO FROM THE EARLY '50S. "LEADING NEW YORK DOCTOR

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0063

1 TELLS HIS PATIENTS WHAT TO SMOKE. FILTERED CIGARETTE SMOKE
2 IS BETTER FOR HEALTH."

3 AND THEN THE OTHER ONE, "NEW KING-SIZE VICEROY
4 GIVES YOU DOUBLE-BARRELLED HEALTH PROTECTION."

5 THESE MAY LOOK LIKE ONE AD. IN FACT, THEY WERE
6 BOTH COLUMNS IN A MAGAZINE AND THESE ARE TWO SEPARATE ADS.

7 Q. MEANING SORT OF A SIDE COLUMN ALONG AN ARTICLE?

8 A. THAT'S CORRECT. AS IT HAPPENED, THEY WERE
9 PHOTOGRAPHED THIS WAY SIDE BY SIDE.

10 THE NEXT EXAMPLE -- THESE ARE ALL EXAMPLES OF
11 THESE EXPLICIT SORT OF HEALTH REASSURANCES. THE NEXT
12 EXAMPLE WAS A BRAND WHOSE VERY NAME WAS A HEALTH REASSURANCE
13 FOR AWHILE. YOU COULD BUY LIFE ITSELF FROM A CIGARETTE
14 COMPANY, LIFE BRAND, "THE LIGHT SMOKE! THE RIGHT SMOKE!"
15 WITH REFERENCE TO NO SLITS OR HOLES IN THE PAPER AND FILTER
16 QUALITIES.

17 AND THE NEXT EXAMPLE SHOWED AN IMPLIED
18 ENDORSEMENT FROM THE UNITED STATES GOVERNMENT, ALTHOUGH IN
19 FACT IT'S FROM THE UNITED STATES TESTING COMPANY. IT MAY
20 LOOK LIKE AN OFFICIAL ENDORSEMENT, BUT IT'S A COMMERCIAL
21 FIRM WHOSE TESTING SERVICES CAN BE PURCHASED. SO "THE FIRST
22 FILTER CIGARETTE IN THE WORLD THAT MEETS THE STANDARDS OF
23 THE UNITED STATES TESTING COMPANY. NEW HI-FI FILTER
24 PARLIAMENT."

25 Q. WHAT'S THE EFFECTS ON THE CONSUMER OF SEEING
26 SOMETHING LIKE THAT?

27 A. WELL, THE IMPLIED, IT WOULD APPEAR AS IF THE
28 GOVERNMENT IS GIVING ITS ENDORSEMENT TO THIS. AND EVEN IF

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0064

1 THAT WEREN'T THE INTERPRETATION, IT STILL SUGGESTS THAT SOME
2 SORT OF SCIENTIFIC OR TESTING BODY ENDORSES THIS PRODUCT.

3 AND THE "HI-FI" REFERENCE IS IN SMALLER
4 PARENTHESES CLARIFIED TO MEAN "HIGH FILTRATION." IN THESE
5 DAYS, "HI-FI" ALSO REFERRED TO STATE OF THE ART AUDIO
6 TECHNOLOGY.

7 Q. THAT WAS YOUR STEREO?

8 A. THAT'S CORRECT. HERE THEY'RE REFERRING TO HIGH
9 FILTRATION. BUT AGAIN, IT'S A REFERENCE TO STATE OF THE ART
10 TECHNOLOGY.

11 THE NEXT EXAMPLE IS VERY SIMPLE CLAIM BY KENT:
12 "NO MEDICAL EVIDENCE OR SCIENTIFIC ENDORSEMENT HAS PROVED
13 ANY OTHER CIGARETTE TO BE SUPERIOR TO KENT."

14 AND AS ADVERTISING COPYRIGHTING, THIS IS QUITE
15 CLEVER, BECAUSE YOU DON'T HAVE TO HAVE ANY VIRTUE TO MAKE
16 THIS CLAIM. IF ALL THE PRODUCTS WERE ALIKE, YOU COULD MAKE
17 THIS CLAIM.

18 Q. AND WHY IS THAT?

19 A. WELL, BECAUSE ALL IT'S SAYING IS THAT "NO ONE
20 ELSE IS ANY BETTER THAN WE ARE." AND TURN THAT AROUND,
21 "WE'RE NO BETTER THAN ANYONE ELSE."

22 THEY ARE NOT SAYING THEY ARE ANY BETTER THAN
23 ANYONE ELSE. "WE'RE JUST SAYING WE'RE AS GOOD AS ANYBODY."

24 SO IT CONVEYS AN IMPRESSION THAT THEY'RE GAINING
25 STATE OF THE ART, THE BEST THAT MONEY CAN BUY. BUT WHEN YOU
26 READ IT CAREFULLY, ALL IT'S SAYING IS THAT "NO ONE ELSE IS
27 ANY BETTER THAN WE ARE." SO THAT'S CHARACTERISTIC OF THE
28 KIND OF ADS IN THIS SECTION.

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0065

1 WE'VE TALKED ABOUT SOME OF THE OTHERS, JUST TO
2 GIVE YOU A FLAVOR FOR THE WAYS IN WHICH CIGARETTES WERE
3 BEING PROMOTED IN THE 1950S AND THE WAYS IN WHICH FILTERS
4 WERE VERY AFFIRMATIVELY BEING SOLD AS A HEALTH VIRTUE. THAT
5 IS A WAY OF RESOLVING HEALTH CONCERNS THAT PEOPLE MIGHT
6 HAVE. AND IT WAS A STRATEGIC REACTION TO THE HEALTH SCARE
7 OF THE 1950S.

8 Q. NOW, YOU'VE ALSO LOOKED AT THE ISSUE OF WHETHER
9 THE ADVERTISING AND MARKETING WAS ADDRESSED TO CHILDREN?

10 A. YES, I HAVE.

11 Q. AND WAS IT?

12 A. YES. THERE'S BEEN ADVERTISING ADDRESSED TO
13 CHILDREN FOR A LONG TIME, BOTH BY THE WAY IN WHICH THE ADS
14 WERE DESIGNED TO GIVE IT APPEALS THAT WOULD BE RESPONDED TO
15 BY YOUNG PEOPLE AND ALSO BY ADVERTISING IN CERTAIN FORMS,
16 LIKE USING CARTOON FORMS OR CERTAIN MEDIA, LIKE ADVERTISING
17 IN THE SUNDAY COMICS, ADVERTISING IN CIRCUS PROGRAMS,
18 ADVERTISING ON RADIO AND TELEVISION PROGRAMS THAT WOULD
19 REACH A YOUNG AUDIENCE.

20 AND THIS IS EXHIBIT 7-A IN EXHIBIT 19 OR 19-7-A.
21 AND WE HAVE -- AGAIN, I'M DATING MYSELF -- BARNEY AND FRED
22 SMOKING A CIGARETTE ON THE FLINTSTONES. BARNEY AND FRED HAVE
23 BEEN LONG-LIVED. THERE HAS BEEN SOME SORT OF FLINTSTONES ON
24 TELEVISION FOR SEVERAL DECADES, AND IN OTHER PLACES LIKE
25 VITAMIN PILLS AND SO ON. BREAKFAST CEREALS AS WELL.

26 THIS IS A STILL FROM A TELEVISION AD OF THEIR
27 PROGRAM AND USING EXACTLY THE SAME FORMAT AS THE PROGRAM.
28 THAT IS, THE PROGRAM WAS DONE -- THE CARTOONS, THE ADS WERE

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0066

1 DONE IN CARTOONS AND IT HAD WHAT IN THE TRADE IS CALLED A
2 SEAMLESS TRANSITION. THAT IS YOU WOULD GO FROM THE PROGRAM

3 INTO THE CARTOON AND BACK INTO THE PROGRAM WITHOUT HARDLY
4 NOTICING THAT THERE HAD BEEN ANY CHANGE, BECAUSE THE VISUAL
5 STYLE AND THE VOICES AND THE CHARACTERS WERE ALL THE SAME.
6 JUST IT WOULD BE COMPLETE CONTINUITY IN AND OUT OF THE
7 ADVERTISEMENT ITSELF.

8 Q. SO IT WOULD SEEM LIKE IT WAS ACTUALLY PART OF THE
9 WHOLE PROGRAM AND THE ACTS THAT WERE TAKING PLACE ON THE
10 PROGRAM?

11 A. THAT'S RIGHT. IT WOULD JUST APPEAR LIKE A
12 REGULAR PART OF THE HUMOR. IN FACT, THE SAME TYPE OF HUMOR
13 WOULD BE USED IN THE AD AS WAS USED IN THE SHOW ITSELF. THE
14 SHOW ITSELF WAS DONE LIKE A SITCOM, A SITUATION COMEDY.

15 Q. AND YOU MENTIONED THAT THIS IS A STILL FROM A
16 COMMERCIAL, AND THE JURY HAS SEEN THIS COMMERCIAL. ARE
17 THERE OTHER CARTOONS THAT USED CIGARETTE SMOKING?

18 A. THERE AREN'T TOO MANY. BUT THERE WERE CARTOON
19 FORMATS USED IN THE SUNDAY COMICS. THERE WERE CARTOON
20 FORMATS USED IN MAGAZINE ADS FOR AWHILE. THERE WERE OTHER
21 CARTOONS THAT APPEARED IN TELEVISION ADS FOR PHILIP MORRIS
22 BRAND. A CARTOON VERSION OF LUCY AND DESI WAS USED AS PART
23 OF THE PROGRAM IDENTIFICATION FOR THE I LOVE LUCY SHOW. AND
24 AGAIN, PROMOTING THE CIGARETTES.

25 Q. AND WERE THOSE PROGRAMS THAT WERE PLAYED DURING
26 HOURS THAT CHILDREN COULD WATCH?

27 A. THEY WERE PLAYED DURING WHAT'S KNOWN AS THE
28 FAMILY HOUR. THAT'S THE EARLY EVENING TIME. YOU MAY HAVE
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0067

1 HEARD THE REFERENCE PRIME TIME, WHICH IS GENERALLY THE MOST
2 EXPENSIVE TIME ON TELEVISION, THE EVENING HOURS, WHICH HAVE
3 THE LARGEST AUDIENCE, AS OPPOSED TO SOAP OPERA DAYTIME
4 TELEVISION.

5 IN PRIME TIME, THE EARLY HOURS ARE KNOWN AS THE
6 FAMILY HOURS, THE 7:00 TO 8:00 AND 9:00. ROUGHLY THOSE
7 FIRST TWO HOURS, 7:00 TO 9:00, IS KNOWN AS FAMILY TIME,
8 BECAUSE OF THE LARGE NUMBER OF YOUNG CHILDREN WATCHING.

9 Q. OKAY. AND AT THE TIME OF THIS CIGARETTE
10 ADVERTISING, USING SOMEONE LIKE BARNEY AND FRED AS PART OF
11 THE PROGRAM ON TELEVISION, GIVE US AN IDEA OF HOW MANY
12 STATIONS WE'RE TALKING ABOUT A FAMILY HAVING A CHOICE
13 BETWEEN IN WATCHING TV PROGRAMS?

14 A. IN THESE DAYS, IN THE LATE '50S, EARLY '60S,
15 THERE WERE ONLY THREE NETWORKS ABC, CBS AND NBC. THERE WAS
16 ALMOST NO CABLE AROUND. THAT WAS STILL EXPERIMENTAL IN A
17 FEW ISOLATED LOCATIONS. I DON'T REMEMBER WHEN PBS BEGAN.
18 BUT ESSENTIALLY YOU WERE CHOOSING WHEN YOU WATCHED
19 TELEVISION BETWEEN THE THREE MAJOR NETWORKS. THEY WERE THE
20 NATIONAL CARRIERS.

21 AND THEN THERE WERE SOME ISOLATED INDEPENDENT
22 STATIONS IN SOME OF THE MAJOR METROPOLITAN MARKETS. SO
23 THERE MIGHT LOCALLY HAVE BEEN ONE OR TWO OTHER SMALLER
24 INDEPENDENT STATIONS IN ADDITION TO THE MAJOR NETWORKS.

25 Q. MANY OF THE PROGRAMS THAT WERE ON DURING THE TIME
26 FRAME THAT WOULD BE CONSIDERED THE FAMILY HOUR, WERE THEY
27 SPONSORED BY CIGARETTE COMPANIES?

28 A. YES. THE FEDERAL TRADE COMMISSION REPORTED DATA
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0068

1 A COUPLE OF TIMES DURING THE 1960S THAT INDICATED THE
2 INCREDIBLE INTENSITY OF CIGARETTE ADVERTISING. IN THE
3 TYPICAL WEEK, THERE WOULD BE I THINK IT WAS 70 SHOWS THAT
4 WERE SPONSORED BY CIGARETTE ADS AND 38 BRANDS AT ONE TIME.
5 SO IT WAS VERY HEAVILY PRESENT ON TELEVISION. YOU COULDN'T

6 WATCH TELEVISION WITHOUT SEEING CIGARETTE ADS.

7 Q. IS THIS SOMETHING THAT YOU HAVE RESEARCHED AND
8 LOOKED INTO, THIS CONCEPT OF HEAVILY CONCENTRATED?

9 A. YES. I'VE DONE SOME RESEARCH AND DONE SOME
10 ANALYSIS ON DATA ORIGINALLY PRESENTED BY THE FEDERAL TRADE
11 COMMISSION TO LOOK AT THEIR DATA AND TO DO TWO THINGS. ONE,
12 TO ESTIMATE HOW MANY TIMES THE AVERAGE PERSON WOULD BE
13 SEEING CIGARETTE ADS. AND THEN TO SEE IF THE PATTERN OF THE
14 PROGRAMMING AND TIME SLOTS THAT THE INDUSTRY WAS BUYING
15 INDICATED A PREFERENCE FOR ADULTS OR CHILDREN.

16 Q. CAN YOU GIVE US -- FIRST OF ALL, DO YOU HAVE AN
17 OPINION AS TO WHAT THAT RESEARCH THAT YOU'VE DONE SHOWS?

18 MR. OHLEMEYER: EXCUSE ME, YOUR HONOR. I OBJECT
19 TO THAT AS LACKING FOUNDATION AND AS PHRASED, IT'S TOO BROAD
20 TO BEGIN WITH.

21 THE COURT: YES, IT IS. YOU CAN REPHRASE IT.

22 MS. CHABER: Q. LET ME JUST BACK UP A SECOND.
23 WHAT DOES THE PHRASE "TV SATURATION" MEAN?

24 A. WELL, "SATURATION" REFERS TO THE EXTENT TO WHICH
25 YOU ARE COVERING ALL OF THE NETWORKS OR ALL OF THE EVENINGS
26 OR, YOU KNOW, ALL OF THE TIME SLOTS OR TO SOME EXTENT IF
27 IT'S NOT FULLY SATURATED, YOU KNOW, AS TO WHAT EXTENT YOU
28 ARE COVERING MOST OF THE NETWORKS OR MOST OF THE TIME SLOTS

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0069

1 OR MOST OF THE PROGRAMS.

2 SO IT'S A QUESTION OF THE DEGREE WHICH YOU'RE
3 PRESENT IN THE TELEVISION PROGRAMMING SCHEDULING.

4 Q. AND YOU'VE LOOKED INTO THIS ISSUE AND DONE
5 RESEARCH AND PUBLISHED ON THE ISSUE OF WHETHER THE CIGARETTE
6 INDUSTRY HAD TV SATURATION DURING THE 1950S AND '60S?

7 A. YES. SPECIFICALLY, I LOOKED AT DATA IN GREAT
8 DETAIL FOR 1963 IN ADDITION TO OTHER INFORMATION I HAD ABOUT
9 THEIR GENERAL HEAVY BUYING OF TELEVISION IN THOSE DECADES.

10 Q. AND IN LOOKING AT 1963, CAN YOU GIVE US SOME
11 EXAMPLES OF WHAT YOU MEAN BY "TV SATURATION"?

12 A. I DON'T HAVE IT IN FRONT OF ME, BUT I DO RECALL
13 THAT --

14 Q. I THINK I COULD GET IT. YOUR HONOR, IT'S MARKED
15 AS PLAINTIFF'S EXHIBIT 20.

16 I BELIEVE IT'S 20-10.

17 A. YES. THIS IS THE WORKING PAPER WHICH
18 SUBSEQUENTLY WAS PUBLISHED IN A PEER-REFEREED JOURNAL.

19 Q. AND YOU ACTUALLY LOOKED INTO INFORMATION ON WHAT
20 THE VARIOUS CIGARETTE COMPANIES -- WHAT PROGRAMS THEY WERE
21 SPONSORING?

22 A. YES, I DID. AND I DID THAT COMPANY BY COMPANY AS
23 WELL AS TIME SLOT BY TIME SLOT.

24 Q. OKAY. SO TELL US WHAT YOU MEAN BY "TIME SLOT."

25 A. THAT IS, THE ORIGINAL DATA WAS PROVIDED TO SHOW
26 WHAT TIME OF NIGHT. IT WAS A LISTING OF ALL THE PROGRAMS
27 ADVERTISED BY TOBACCO AND IT PROVIDED THE TIME SLOT
28 INFORMATION OF WHAT TIME OF NIGHT AND ALL THE AUDIENCE

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0070

1 INFORMATION, HOW MANY YOUNG CHILDREN UNDER -- THERE'S 12 OR
2 YOUNGER, IF I REMEMBER CORRECTLY, HOW MANY TEENAGERS, SO THE
3 13 TO 17, AND HOW MANY ADULTS.

4 AND SO I TOOK THAT DATA AND ORGANIZED IT TO LOOK
5 AT IT BOTH COMPANY BY COMPANY, THAT IS WERE THE COMPANIES
6 BEHAVING IN SIMILAR FASHIONS, AND THEN LOOKED AT THE TIME
7 SLOT DATA AS WELL TO SEE IF THERE WAS A SYSTEMATIC PATTERN
8 IN THAT.

9 Q. WHEN YOU SAY "THE COMPANIES WERE BEHAVING IN A
10 SIMILAR PATTERN," WHAT DO YOU MEAN?

11 A. IT WAS CLEAR THAT THEY WERE BUYING MANY PROGRAMS
12 THAT HAD VERY SUBSTANTIAL CHILDREN'S AUDIENCES, LIKE THE
13 BEVERLY HILLBILLIES. AND SO WE LOOKED THEN TO SEE, FOR
14 EXAMPLE, HOW MANY -- THAT PARTICULAR PROGRAM, 38 PERCENT OF
15 ITS AUDIENCE WAS UNDER AGE, WERE MINORS.

16 WE LOOKED TO SEE IF THERE WERE OTHER PROGRAMS
17 BEING BOUGHT THAT ALSO HAD A HIGH FRACTION, THAT WE DEFINED
18 AS 30 PERCENT OR MORE MINORS, AND WAS THAT BEING DONE BY ALL
19 ONE COMPANY OR BY ALL OF THE COMPANIES OR SOME BUT NOT ALL
20 OF THE COMPANIES.

21 Q. AND WHAT DID YOU CONCLUDE?

22 A. USING THAT CRITERION, ALL OF THE COMPANIES EXCEPT
23 FOR BROWN & WILLIAMSON WERE BUYING PROGRAMMING THAT REACHED
24 LARGE FRACTIONS OF CHILDREN'S AUDIENCES. THEY WERE THE ONLY
25 ONES WHO DIDN'T HAVE A PROGRAM THAT THEY PURCHASED THAT HAD
26 30 PERCENT OR MORE CHILDREN.

27 Q. AND WHAT WOULD HAPPEN WHEN YOU LOOKED AT THE SLOT
28 OR THE TIME SLOT SPONSORSHIP? WHAT DID THAT TELL YOU?

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0071

1 A. WE LOOKED AT THE TIME SLOT PREFERENCES OF THE
2 INDUSTRY, THAT IS, HOW MANY PROGRAMS IN A CERTAIN TIME SLOT
3 THEY WERE BUYING, AND COMPARED THAT TO THE AUDIENCES THAT
4 WERE AVAILABLE IN THOSE TIME SLOTS AND LOOKED FOR
5 CORRELATIONS. AND WHAT WE FOUND IS THAT THE PATTERNS
6 OBSERVED CORRELATE WITH THE PRESENCE OF CHILDREN BUT NOT
7 WITH THE PRESENCE OF ADULTS.

8 Q. EXPLAIN THAT.

9 A. SO IT WOULD APPEAR THAT THE PATTERNS OF THE DATA
10 SUGGEST THAT THE MEDIA PURCHASING, THAT IS THE INDUSTRY'S
11 PREFERENCES FOR WHICH SHOWS THEY WANTED TO BUY --

12 THE COURT: HOLD ON.

13 MR. OHLEMEYER: EXCUSE ME, YOUR HONOR. I DON'T
14 MEAN TO INTERRUPT. NOW WE'RE IN AN AREA COVERED BY RULE
15 801(A).

16 THE COURT: I THINK WE'RE ACTUALLY BEYOND THE
17 QUESTION ANYWAY. GO ON TO THE NEXT QUESTION.

18 MS. CHABER: Q. WHEN YOU LOOKED AT THE
19 INFORMATION AS TO THE AUDIENCE OF CHILDREN, DID YOU
20 DETERMINE WHETHER OR NOT THE AUDIENCE THAT HAD 30 PERCENT OR
21 MORE SHARES OF CHILDREN, WHETHER THERE WAS CIGARETTE
22 ADVERTISING ON DURING THAT TIME?

23 A. YES, WE DID.

24 Q. AND WAS THERE?

25 A. YES. THERE WERE IN A LARGE NUMBER OF INSTANCES.

26 Q. AND WE STARTED THIS OUT BY MY ASKING ABOUT
27 SATURATION OF A PARTICULAR TIME SLOT. CAN YOU GIVE US AN
28 EXAMPLE OF HOW THAT WOULD WORK. AND THIS AGAIN WAS DATA

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0072

1 THAT YOU LOOKED AT FROM 1963?

2 A. YES, IT WAS.

3 THE COURT: INCIDENTALLY, FOR THE RECORD, I DID
4 SUSTAIN THE OBJECTION, YOUR LAST OBJECTION.

5 MR. OHLEMEYER: THANK YOU.

6 THE WITNESS: THE OVERALL WEEKLY SCHEDULE IS
7 SHOWN IN EXHIBIT 2 OF THAT PAPER, WHICH IS PAGE 6, ALTHOUGH
8 THE PAGE ITSELF ISN'T NUMBERED.

9 MS. CHABER: Q. WOULD YOU TALK ABOUT WHAT DAY
10 AND TIME YOU'RE LOOKING AT.

11 A. WELL, IN THAT EXHIBIT, WHAT THIS DOES IS SHOW THE

12 SEVEN DAYS OF THE WEEK, THE THREE NETWORKS FOR EACH DAY AND
13 THEN ALL THE VARIOUS TIME SLOTS, INCLUDING THE DAYTIME
14 SLOTS. AND THEN EVERY SLOT THAT WAS ADVERTISED BY A
15 CIGARETTE ADVERTISER THAT WAS INDICATED.

16 AND WHEN YOU LOOK, STAND BACK AND LOOK AT THE
17 OVERALL PATTERN, YOU REALIZE THAT IT SEEMED LIKE HALF OR
18 MORE OF THE EVENING TIME SLOTS WERE BEING BOUGHT BY
19 CIGARETTE COMPANIES. SO THAT IF AT RANDOM YOU WATCHED
20 TELEVISION FOR AN HOUR A HALF, FOR A HALF HOUR OF THAT YOU'D
21 SEE SOMETHING ADVERTISED BY A CIGARETTE COMPANY.

22 Q. AND WHAT IS THE SOURCE OF THAT INFORMATION?

23 A. A FEDERAL TRADE COMMISSION REPORT.

24 MS. CHABER: YOUR HONOR, I WOULD PROPOSE JUST
25 EXHIBIT 2 OF THIS. I CAN MAKE A SEPARATE COPY OF IT TO BE
26 OFFERED BY THE PLAINTIFF.

27 THE COURT: ARE YOU OFFERING AN EXHIBIT?

28 MS. CHABER: I'M OFFERING A PORTION OF 20-10,
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0073

1 WHICH IS A SINGLE PAGE WITHIN THAT THAT INDICATES -- AT THE
2 BOTTOM, IT SAYS "EXHIBIT 2, CIGARETTE SPONSORSHIP WEEKLY
3 SCHEDULE."

4 THE COURT: IF YOU'RE OFFERING A PORTION OF
5 SOMETHING THAT'S ALREADY BEEN MARKED, I THINK YOU ARE GOING
6 TO HAVE TO GET IT REMARKED, BECAUSE I DON'T WANT TO GO
7 THROUGH AND TAKE THINGS APART. DO YOU HAVE ANOTHER COPY OF
8 IT?

9 MS. CHABER: SEPARATE AND PART FROM THE EXHIBIT,
10 NOT AT THIS TIME.

11 THE COURT: THESE HAVE ALREADY BEEN MARKED. I
12 DON'T WANT TO START GETTING INTO A PRACTICE OF PULLING THESE
13 APART. BUT IF YOU WANT TO REMARK THE FRONT PAGE OF THAT AS
14 A SEPARATE EXHIBIT, AND IF THAT'S WHAT YOU ARE OFFERING --
15 IS THAT WHAT YOU ARE DOING?

16 MS. CHABER: YES. I WOULD MARK IT AS A SUBPART
17 OF THE SAME EXHIBIT. SO THIS WOULD BE SAY 10-A -- EXHIBIT
18 20-10-A.

19 THE COURT: ALL RIGHT. LET ME LEAVE IT UP TO
20 YOU TO GET THAT IN VERA'S HANDS AT THE RECESS. AS I
21 UNDERSTAND IT, YOU WANT TO HAVE REMARKED THE FIRST PAGE OF
22 WHAT WAS 20-10, NOW MARKED AS 20-10-A, AND YOU WANT TO OFFER
23 THAT SEPARATELY INTO EVIDENCE. DO I HAVE THAT RIGHT?

24 MS. CHABER: NO. UNFORTUNATELY, YOUR HONOR, I'M
25 NOT BEING VERY ARTICULATE AT THIS TIME.

26 THE COURT: MAYBE I'M JUST BEING DENSE. WHAT
27 ARE WE DOING?

28 MS. CHABER: WE'RE LOOKING AT PAGE 6 OF 20-10.
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0074

1 THE COURT: PAGE 6?

2 MS. CHABER: THEY'RE NOT NUMBERED, BUT IF YOU
3 COUNT THE PAGES. I APOLOGIZE.

4 THE COURT: ARE YOU COUNTING THE FRONT AND THE
5 BACK AS ONE OR TWO?

6 THE WITNESS: THERE ARE SOME NUMBERS IN THE
7 UPPER RIGHT-HAND CORNER OF MOST PAGES.

8 THE COURT: WHAT IS THE NUMBER IN THE UPPER
9 RIGHT-HAND CORNER THAT YOU WANT TO HAVE MARKED SEPARATELY?

10 THE WITNESS: THAT ONE IS THE ONE THAT DOESN'T
11 HAVE A NUMBER.

12 MS. CHABER: THE OTHER SIDE OF IT SAYS 7, YOUR
13 HONOR. THIS IS THE FRONT AND BACK COPY.

14 THE COURT: DO YOU WANT TO SHOW IT TO COUNSEL?

15 I THINK IT'S A CHART.
16 MS. CHABER: YES. JUST THIS (INDICATING).
17 THE COURT: YOU WANT TO HAVE THAT MARKED AS
18 20-10-A?
19 MR. OHLEMEYER: I HAVE NO OBJECTION TO THAT,
20 YOUR HONOR.
21 THE COURT: OKAY. LET ME JUST TELL THE JURY
22 WHAT WE'RE DOING, IF IT'S RIGHT NOW.
23 MS. CHABER: 20-10-A.
24 THE COURT: YOU WANT TO HAVE MARKED AS 20-10-A
25 THE PORTION OF WHAT WAS OR WHAT IS 20-10 THAT HAS AS ITS
26 FLIP SIDE PAGE 7 BUT NO NUMBER ON THIS SIDE?
27 MS. CHABER: RIGHT. CORRECT.
28 THE COURT: YOU ARE OFFERING THAT INTO
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0075
1 EVIDENCE?
2 MS. CHABER: YES.
3 THE COURT: AND IS THERE AN OBJECTION TO THAT?
4 MR. OHLEMEYER: I'M SORRY. NO, YOUR HONOR.
5 THE COURT: OKAY. THERE IS NO OBJECTION TO IT
6 GOING INTO EVIDENCE?
7 MR. OHLEMEYER: THE CHART?
8 THE COURT: THE CHART.
9 MS. CHABER: RIGHT. THAT'S ALL I'M OFFERING.
10 THE COURT: 20-10-A IS RECEIVED.
11
12 THE COURT: YOU KNOW WHAT WE NEED TO BE SURE
13 OF --
14 THE CLERK: I'M GOING TO MARK IT RIGHT NOW.
15 THE COURT: LET'S MARK IT RIGHT NOW AND GET IT
16 XEROXED OVER THE RECESS SO WE DON'T LOSE CONTROL.
17 THE CLERK: PLAINTIFF'S EXHIBIT 20-10-A FOR
18 IDENTIFICATION AND MOVED INTO EVIDENCE.
19 (DOCUMENT MORE PARTICULARLY
20 DESCRIBED IN THE INDEX MARKED
21 FOR IDENTIFICATION PLAINTIFF'S
22 EXHIBIT # 20-10-A)
23 THE COURT: AND RECEIVED.
24 (DOCUMENT MORE PARTICULARLY
25 DESCRIBED IN THE INDEX RECEIVED
26 IN EVIDENCE AS PLAINTIFF'S
27 EXHIBIT # 20-10-A)
28 THE COURT: WOULD YOU GET AN EXTRA COPY MADE FOR
JUDITH ANN OSSA, CSR NO. 2310
0076
1 ME AS WELL DURING THE RECESS.
2 MS. CHABER: ABSOLUTELY, YOUR HONOR.
3 THE COURT: THANK YOU.
4 WHEN YOU XEROX IT, DON'T XEROX THE BACK SIDE.
5 MS. CHABER: THAT'S CORRECT. CORRECT.
6 THE CLERK: I MARKED THE ORIGINAL WITH THE STUFF
7 ON THE BACK.
8 THE COURT: THE DOCUMENT AS RECEIVED IN EVIDENCE
9 ISN'T GOING TO HAVE THE BACK SIDE ON IT.
10 MS. CHABER: NO.
11 Q. I DON'T KNOW IF YOU CAN SEE THIS, BUT YOU'VE GOT
12 IT IN FRONT OF YOU. IS THIS THE SCHEDULING?
13 A. YES, IT IS. AND ALL OF THE AREAS THAT SORT OF
14 LOOK GRAY ARE ACTUALLY INITIALED TO SHOW THE ADVERTISING
15 FIRMS, THAT'S "RJR" FOR R.J. REYNOLDS; "ABC" FOR AMERICAN
16 TOBACCO; "PM" FOR PHILIP MORRIS AND SO ON.
17 Q. AND WHAT SHOWS DID PHILIP MORRIS -- WHAT SHOWS

18 WERE THEY SPONSORS OF IN THIS 1963 TIME PERIOD?
19 A. WELL, THE SHOWS THAT HAD PARTICULARLY LARGE
20 AUDIENCES OF CHILDREN WERE THE JACKIE GLEASON SHOW, THE RED
21 SKELETON SHOW AND ROUTE 66, AND THEN THEY WERE ALSO
22 SPONSORING RAWHIDE, PERRY MASON, AND THERE MAY BE MORE. I
23 DON'T HAVE THE MASTER LIST IN FRONT OF ME.

24 Q. OKAY.

25 A. THEY HAD A TOTAL OF EIGHT SHOWS SPONSORED
26 COVERING 18 HOURS OF TELEVISION. 18 AND A HALF HOURS.
27 EXCUSE ME. I STAND CORRECTED. 18 HALF-HOUR SLOTS.

28 Q. 18 HALF-HOUR SLOTS?

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0077

1 A. RIGHT.

2 Q. MOST OF THE PROGRAMS WERE EITHER AN HOUR OR A
3 HALF HOUR?

4 A. YES, BUT SOME, LIKE SATURDAY NIGHT AT THE MOVIES,
5 MIGHT BE A TWO-HOUR SLOT.

6 Q. AND SO HOW WOULD IT WORK IN TERMS OF SATURATING A
7 GIVEN TIME SLOT WITH CIGARETTE ADS?

8 A. IF YOU LOOK HORIZONTALLY ON THIS KIND OF CHART,
9 YOU CAN SEE A SITUATION THAT IN THE TRADE IS REFERRED TO AS
10 ROADBLOCKING; THAT IS, IF YOU, SAY, LOOK AT 7:30 TO 8:00
11 O'CLOCK FAMILY TIME, THERE JUST ON MONDAY YOU SEE THAT --
12 MAYBE IF YOU PUT A POINTER --

13 A JUROR: WE CAN'T READ THAT.

14 THE WITNESS: NO MATTER WHICH CHANNEL YOU TURN
15 TO, YOU WOULD SEE CIGARETTE ADVERTISING; THAT IS, R.J.
16 REYNOLDS WAS ADVERTISING ON CBS, LIGGETT & MYERS WAS ON ABC
17 AND THE AMERICAN TOBACCO COMPANY WAS ON NBC.

18 MS. CHABER: Q. I DON'T THINK THEY HAD REMOTE
19 CONTROLS BACK IN 1963?

20 A. THAT'S MY UNDERSTANDING AS WELL.

21 Q. BUT IF YOU WERE DOING THE EQUIVALENT OF CHANNEL
22 SEARCHING NOW BETWEEN THE THREE MAJOR NETWORKS AT THAT TIME
23 SLOT, WOULD THERE BE CIGARETTE COMMERCIALS ON ALL OF THEM?

24 A. NO MATTER WHICH WAY YOU TURNED, YOU'D ENCOUNTER
25 CIGARETTE COMMERCIALS. THAT'S WHY THE TERMINOLOGY ROADBOCK;
26 THAT IS, NO MATTER WHICH ROAD YOU TAKE, YOU WOULD ENCOUNTER
27 AN OBSTACLE. THAT'S THE NOTION HERE. A ROADBLOCK IS A
28 PATTERN OF VIDEO PURCHASING SUCH THAT NO MATTER WHAT YOU

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0078

1 CHOOSE, YOU ENCOUNTER THE ADVERTISING.

2 Q. THIS ADVERTISING ON TELEVISION WAS ON UNTIL THE
3 BEGINNING OF THE 1970'S?

4 A. YES, IT WAS.

5 Q. I WANTED TO GO BACK TO THE YOUTH ADS THAT WE WERE
6 TALKING ABOUT. THE LAST ONE WE HAVE SEEN WAS THE
7 FLINTSTONES, WHICH WAS THE STILL FROM THE PROGRAM?

8 A. YES. THE NEXT ONE, THE B ONE IS INTERESTING. WE
9 COULD HAVE LOOKED AT THIS EARLIER WHEN WE WERE TALKING.
10 THIS IS AN ATHLETE ENDORSEMENT. THIS IS FRANK GIFFORD,
11 KATHY LEE'S HUSBAND.

12 Q. WHO WAS FAMOUS FOR OTHER THINGS THEN?

13 A. HE WAS FAMOUS FOR OTHER FOR THINGS THEN. HE WAS
14 A STAR FOOTBALL PLAYER BOTH IN COLLEGE AND AS A PRO. BUT
15 YOU'LL NOTICE GOING UP TO THE TOP HERE IS "GET LUCKY, THE
16 TASTE TO START WITH, THE TASTE TO STAY WITH."

17 STARTERS IS A VERY IMPORTANT STRATEGIC MARKET FOR
18 CIGARETTE INDUSTRY, BECAUSE PEOPLE --

19 MR. OHLEMEYER: EXCUSE ME, YOUR HONOR. I OBJECT
20 TO THAT AS AGAIN CALLING FOR TESTIMONY UNDER 801(A).

21 THE COURT: SUSTAINED.
22 MS. CHABER: Q. IN YOUR REVIEW OF DOCUMENTS
23 PRODUCED BY THE CIGARETTE COMPANIES, IS THE TERM "STARTER
24 SMOKER" USED?
25 A. YES.
26 Q. AND WHAT DOES IT MEAN?
27 MR. OHLEMEYER: OBJECTION, YOUR HONOR. I OBJECT
28 TO THE FORM OF THE QUESTION AS IT'S PHRASED. WHAT DOES IT
JUDITH ANN OSSA, CSR NO. 2310

0079

1 MEAN TO THE WITNESS IS A GOOD QUESTION.
2 THE COURT: WHY DON'T YOU CLARIFY. WHAT DOES IT
3 MEAN TO HIM OR IN WHAT CONTEXT?
4 MS. CHABER: Q. WHAT DOES IT MEAN TO YOU? AND
5 THEN I'LL ASK YOU WHAT YOUR BASIS OF THAT MEANING IS?
6 A. IT MEANS PEOPLE JUST BEGINNING TO SMOKE.
7 SOMETIMES IT CAN BE DEFINED AS THE VERY FIRST SAMPLING OF A
8 CIGARETTE. SOMETIMES IT CAN BE DEFINED AS THE FIRST TIME
9 YOU PURCHASE A PACK OR THE FIRST TIME YOU SMOKE ON A REGULAR
10 BASIS. THERE CAN BE DIFFERENT OPERATIONAL DEFINITIONS OF
11 WHAT CONSTITUTES STARTING. BUT IT'S A REFERENCE TO THAT
12 STARTING PROCESS.
13 Q. AND WHAT'S THE BASIS OF YOUR INFORMATION, THE
14 BASIS OF YOUR OPINION THAT THAT IS WHAT "STARTERS" MEANS?
15 A. BOTH MY REVIEW OF THE CORPORATE DOCUMENTS AND
16 OTHER EPIDEMIOLOGICAL PAPERS BY PEOPLE IN PUBLIC HEALTH.
17 Q. AND WHAT IS THE AGE OF STARTERS?
18 A. MINORS. ALMOST EXCLUSIVELY MINORS. IT DEPENDS
19 ON THAT DEFINITION. BUT GENERALLY SPEAKING, 90 PERCENT OF
20 SMOKERS START AS MINORS. THERE'S ALMOST -- WELL, THERE IS
21 VERY LITTLE ONSET OF SMOKING AMONG ADULTS. USUALLY BY THE
22 TIME YOU REACH THE AGE OF 18 AND HAVE MANAGED TO GET THAT
23 OLD WITHOUT TAKING UP SMOKING, YOU ARE UNLIKELY TO TAKE IT
24 UP AT AN OLDER AGE.
25 Q. AND THE INFORMATION THAT YOU RELY ON FOR THAT
26 OPINION IS FROM THE INDUSTRY'S OWN DOCUMENTS?
27 A. YES, IT IS, FROM MOST IF NOT ALL OF THE FIRMS.
28 Q. AND THAT WOULD INCLUDE PHILIP MORRIS?
JUDITH ANN OSSA, CSR NO. 2310

0080

1 A. THAT WOULD INCLUDE PHILIP MORRIS. THIS IS THE
2 LAUNCH OF THE MARLBORO BRAND (INDICATING) --
3 MR. OHLEMEYER: EXCUSE ME, YOUR HONOR. I DON'T
4 MEAN TO INTERRUPT. THERE IS NO QUESTION.
5 THE COURT: THAT'S RIGHT. WE NEED TO PROCEED BY
6 QUESTION AND ANSWER.
7 THE WITNESS: I UNDERSTAND THAT. I'M USED TO A
8 CLASSROOM. I APOLOGIZE.
9 MS. CHABER: Q. WE'RE LOOKING AT EXHIBIT
10 19-7-B.
11 MS. WHITE: C.
12 MS. CHABER: C. EXCUSE ME.
13 Q. WHICH IS A MARLBORO AD. CAN YOU TELL US WHAT
14 THIS IS?
15 THE COURT: 19-7-C?
16 THE WITNESS: YES.
17 THE COURT: OKAY.
18 THE WITNESS: THIS IS AN AD FROM 1955 WHEN THE
19 MARLBORO BRAND WAS BEING REPOSITIONED. AGAIN, THAT'S SORT
20 OF TRADE JARGON.
21 MS. CHABER: Q. WHAT DOES THAT MEAN?
22 A. WHAT THAT MEANS IS THAT THEY WERE TRYING TO
23 CHANGE PERCEPTIONS OF THIS PRODUCT AND BRAND TO MAKE IT

24 MASCULINE. MARLBORO PRIOR TO THIS DATE HAD BEEN SOLD ON A
25 VERY SMALL SCALE TO WOMEN UNDER THE SLOGAN "MILD AS MAY."

26 Q. SO THIS IS THIS THE BEGINNING OF A NEW AD
27 CAMPAIGN FOR MARLBORO?

28 A. IT IS, AND AT THIS STAGE THE CAMPAIGN WAS NOT
JUDITH ANN OSSA, CSR NO. 2310

0081

1 ABOUT THE MARLBORO COUNTRY WE NOW KNOW, THE COWBOYS AND
2 HORSES AND OUTDOOR SCENERY. HERE, THE MOTIVE AROUND WHICH
3 THE CAMPAIGN EVOLVED WAS THIS TATTOO -- IT'S A BIT SUBTLE --
4 ON THE BACK OF HIS HAND, BUT IT SHOWED -- THE CAMPAIGN
5 SHOWED CONSISTENTLY MEN THAT APPEARED TO BE WORLD WAR II
6 VETERANS, ALL OF WHOM HAD THESE TATTOOS THAT SUGGESTED
7 MILITARY SERVICE AND WERE SHOWN SMOKING MARLBORO.

8 AND ONE OF THE REASONS FOR THIS WAS TO TRY AND
9 OFFER A FILTER PRODUCT THAT WOULD BE ACCEPTABLE TO MEN.

10 Q. IS THIS AN AD THAT ILLUSTRATES YOUR POINT ABOUT
11 YOUTH?

12 A. IT DOESN'T REALLY, IN THE SENSE THAT WHILE THIS
13 PRODUCT -- EXCUSE ME -- WHILE THE ADVERTISING FOR MARLBORO
14 IN THE MODERN ERA, IN THE COWBOY ERA HAS BEEN PHENOMENALLY
15 SUCCESSFUL, IT DIDN'T START OUT THAT WAY. IT STARTED OUT
16 WITH THIS MORE ADULT IMAGERY, TRYING TO ESSENTIALLY
17 COMMUNICATE MASCULINITY, TRYING TO SUGGEST THAT FILTERS WERE
18 NOT A WIMPY THING, THAT REAL MEN COULD SMOKE A REAL
19 CIGARETTE AND THEY CHOSE THE MARLBORO FILTERED PRODUCT.

20 Q. SINCE YOU RAISED THE MORE MODERN ERA OF MARLBORO,
21 IS THERE IN YOUR RESEARCH EVIDENCE THAT MARLBORO IS POPULAR
22 IN THE MINOR AGE GROUP?

23 A. IT'S THE MOST POPULAR BRAND BY FAR AMONG MINORS,
24 BOTH MEN AND WOMEN.

25 Q. AND WAS THAT TRUE IN THE 1960'S?

26 A. MY UNDERSTANDING IS THAT IT WAS. ITS SUCCESS IN
27 GENERAL IS BECAUSE OF ITS SUCCESS AT RECRUITING STARTERS.

28 Q. AND WHEN YOU TALK ABOUT THE MORE MODERN MARLBORO
JUDITH ANN OSSA, CSR NO. 2310

0082

1 AD -- AND THIS IS 17 --

2 MS. WHITE: J.

3 MS. CHABER: Q. -- J, THIS IS REALLY MODERN?

4 A. THIS IS QUITE MODERN. ALTHOUGH THIS CAMPAIGN HAS
5 BEEN PRETTY SUBSTANTIALLY UNCHANGED SINCE THE ONSET OF THE
6 MARLBORO COUNTRY THEME THAT OCCURRED 35, 36 YEARS AGO NOW.
7 1962 WAS WHEN THEY MOVED AWAY FROM THAT TATTOO AND STARTED
8 TO FOCUS ON THE COWBOY. SOME OF THE VERSIONS ARE PRESENT,
9 THESE PANORAMIC OUTDOOR SCENES. SOME FOCUS IN MORE ON THE
10 COWBOY AS THE FOCAL POINT OF THE AD, BUT THIS IS
11 CHARACTERISTIC OF THESE ADS AND COULD BE EASILY CONFUSED FOR
12 MARLBORO ADVERTISING FROM ANY PERIOD IN THE LAST THREE
13 DECADES.

14 MS. CHABER: AND AT THIS TIME, YOUR HONOR, I'D
15 LIKE TO HAVE MARKED FOR EVIDENCE OR FOR IDENTIFICATION AND
16 PER OUR DISCUSSION, THIS WOULDN'T BE SOMETHING SHOWN TO THE
17 JURY --

18 THE COURT: GO AHEAD.

19 MS. CHABER: -- AND GO NECESSARILY INTO THE JURY
20 ROOM.

21 THE COURT: THAT'S FINE.

22 MS. CHABER: OKAY.

23 THE COURT: AND I TAKE IT WE HAVE A STIPULATION
24 THROUGHOUT THE COURSE OF THE TRIAL THAT INSOFAR AS YOU SHOW
25 THINGS TO THE JURY ON THE VIDEOTAPE THAT HAVE BEEN MARKED
26 FOR IDENTIFICATION, THAT MY COURT REPORTER NEED NOT REPORT

27 THE WORDS ON THE VIDEOTAPE, AND THAT WE CAN HAVE THAT
28 STIPULATION FOR THE REMAINDER OF THE TRIAL, WITH OF COURSE
JUDITH ANN OSSA, CSR NO. 2310

0083

1 YOUR HAVING THE RIGHT TO CHANGE THAT AT ANY TIME, BUT SO
2 THAT WE DON'T NEED TO KEEP REPEATING IT EACH TIME. IS THAT
3 SO STIPULATED?
4 MS. CHABER: YES.
5 MR. OHLEMEYER: SO STIPULATED.
6 THE COURT: THANK YOU.
7 MR. OHLEMEYER: IS THIS BEING OFFERED, YOUR
8 HONOR?
9 THE COURT: I THINK WHAT SHE IS GOING TO DO, SHE
10 IS GOING TO MARK IT FOR IDENTIFICATION. I WAS ANTICIPATING
11 THAT SHE WANTED TO PLAY IT. AND YES, SHE'S ASKING THAT IT
12 BE MARKED.
13 IS THAT RIGHT?
14 MS. CHABER: YES.
15 MR. OHLEMEYER: AM I CORRECT, IT'S
16 ADVERTISEMENTS?
17 THE COURT: I DON'T KNOW WHAT IT IS.
18 MS. CHABER: YES. I WAS ABOUT TO STATE THAT
19 WHEN I HAD IT MARKED.
20 THE COURT: LET'S HAVE IT MARKED FIRST. IT'S
21 PLAINTIFF'S EXHIBIT 28 FOR IDENTIFICATION. VERA, IS THAT
22 RIGHT?
23 THE CLERK: THAT'S CORRECT.
24 THE COURT: OKAY.
25 (VIDEOTAPE MORE PARTICULARLY
26 DESCRIBED IN THE INDEX MARKED
27 FOR IDENTIFICATION PLAINTIFF'S
28 EXHIBIT # 28)
JUDITH ANN OSSA, CSR NO. 2310

0084

1 MS. CHABER: FOR THE RECORD, PLAINTIFF'S EXHIBIT
2 28 IS A SERIES -- I BELIEVE THERE ARE FIVE, POSSIBLY SIX
3 PHILIP MORRIS AND MARLBORO ADVERTISEMENTS.
4 THE COURT: OKAY. IS THERE ANY OBJECTION TO
5 THIS BEING PLAYED TO THE JURY?
6 MR. OHLEMEYER: NO, THERE'S NOT.
7 THE COURT: OKAY. YOU MAY DO THAT.
8 MS. CHABER: THANK YOU.
9 THE COURT: THE RECORD WILL REFLECT THAT THAT'S
10 BEING DONE, ALTHOUGH IT WILL NOT BE REPORTED
11 MS. CHABER: AND IF THE WITNESS COULD STEP DOWN,
12 YOUR HONOR, SO HE COULD SEE?
13 THE COURT: YES.
14 MS. CHABER: BECAUSE I MAY WANT TO STOP IT.
15 THE COURT: THAT WILL BE REPORTED, IF YOU ASK
16 QUESTIONS.
17 MS. CHABER: OKAY.
18 (VIDEOTAPE PLAYED)
19 MS. CHABER: THIS WAS JUST A BAD DUB AT THE
20 BEGINNING, YOUR HONOR. IT SHOULD HAVE BEEN WOUND UP, BUT IT
21 STARTS NOW.
22 (VIDEOTAPE PLAYED)
23 MS. CHABER: Q. WE HAD DISCUSSED EARLIER THE
24 UNIQUE VOICE AND THE PHILIP MORRIS AD. WAS THAT WHAT WAS
25 JUST REFERRED TO?
26 A. THAT WAS JOHNNY ROVENTINI DOING THAT VOICEOVER,
27 THAT PAGE BOY CARTOON.
28 Q. AND WAS THE SHOW THAT LUCILLE BALL AND DESI ARNEZ
JUDITH ANN OSSA, CSR NO. 2310

0085

1 WERE IN, WAS THAT PLAYED DURING THE FAMILY HOUR?

2 A. YES. IT WAS THE MOST POPULAR SHOW ON TELEVISION
3 DURING ITS TIME.

4 (VIDEOTAPE IS PLAYED)

5 MS. CHABER: Q. WHAT WAS THIS?

6 A. THAT WAS AN AD SIMILAR TO THE PRINT ADS WE SEE
7 WHICH MADE SPECIFIC REFERENCE TO THROATS AND GENTLENESS ON
8 THE THROAT, THROAT COMFORT. IT WAS LIKE THE T-ZONE ADS WE
9 HAVE SEEN AND THE OTHER PHILIP MORRIS ADS. SO IT IS
10 SPECIFIC TO THROAT IRRITATION AND THAT ISSUE.

11 Q. OKAY. HE WAS MAKING SOME REFERENCE TO JINGLES OR
12 SONGS. WHAT WAS THAT REFERENCE?

13 A. WELL, TO THE HIT PARADE, THAT IS TO THE
14 POPULARITY OF SONGS AND HOW THEY BECAME THE NO. 1 CHOICE
15 ACROSS THE NATION IN FACT, SO HIS REFERENCE TO THE HIT
16 PARADE GENERALLY.

17 Q. WHAT WAS THE HIT PARADE?

18 A. WELL, THE HIT PARADE WAS ACTUALLY A SHOW
19 SPONSORED BY A COMPETITOR, BY THE AMERICAN TOBACCO COMPANY,
20 WHICH PLAYED MOST POPULAR MUSIC OF THE DAY, JUST LIKE MTV
21 PLAYS THE MOST POPULAR MUSIC OF THE DAY TODAY ON TELEVISION.

22 (VIDEOTAPE PLAYED)

23 MS. CHABER: Q. THE COMMERCIAL THAT WE JUST
24 SAW, DOES THAT COINCIDE WITH THE PREVIOUS AD THAT WE HAD
25 SEEN WITH RESPECT TO THE INTRODUCTION OF THE NEW MARLBORO
26 CAMPAIGN?

27 A. I'M NOT SURE IT PRECISELY COINCIDED. THIS WAS
28 ALSO 1955, BUT IT WOULD HAVE BEEN PART OF THAT LAUNCH

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0086

1 CAMPAIGN EFFORT, THAT IS THE FIRST COUPLE OF YEARS WHEN THE
2 FOCUS WAS ON THIS KIND OF RUGGED MASCULINITY IN ORDER TO
3 ESTABLISH THAT REAL MEN COULD BE SEEN SMOKING FILTER
4 CIGARETTES WITHOUT BEING ACCUSED OF BEING WIMPISH.

5 Q. AND BEFORE THAT, BEFORE FILTERED CIGARETTES, THE
6 CIGARETTES WERE NONFILTERED?

7 A. YES. MOST CONSUMPTION UP TO THIS TIME WAS OF THE
8 NONFILTERED PRODUCTS. AND WHEN FILTERED PRODUCTS WERE FIRST
9 INTRODUCED, THE KENT AND L&M AND SO ON, THEY WERE FIRST
10 TAKEN UP BY WOMEN; THAT IS, WOMEN WERE QUICKER TO TAKE UP
11 FILTERS THAN WERE MEN.

12 Q. AND THIS AD, WHAT EFFECT WOULD IT HAVE ON THE
13 CONSUMER EXPECTATION OF SAFETY OF THE PRODUCT BEING SOLD?

14 A. WELL, THERE'S NO -- THERE'S NO HAZARDS
15 MENTIONED. THERE'S NO HEALTH CONCERN REFERRED TO AT ALL.
16 SO I THINK IT'S JUST HERE. PRIMARILY, IT'S THE FACT OF THE
17 ADVERTISING; THAT IS, THE REINSURANCE RATHER THAN ANY
18 SPECIFIC HEALTH CLAIM IN THE AD. THE FACT THAT THEY
19 ADVERTISED IT ON NATIONAL TELEVISION MAKES IT SEEM PRETTY
20 LEGITIMATE.

21 Q. HE MADE A COMMENT ABOUT "I FORGET TO EAT WHEN I'M
22 WORKING BUT I NEVER FORGET TO SMOKE." DOES THAT TEND TO
23 EQUATE EATING AND SMOKING AS BEING RELATIVE ACTIVITIES?

24 A. WELL, IT SUGGESTS FOR AT LEAST THAT PERSON THAT
25 SMOKING IS MORE IMPORTANT THAN THE EATING; THAT IS, HE'S
26 MORE LIKELY TO DO IT ON A REGULAR BASIS.

27 (VIDEOTAPE PLAYED)

28 MS. CHABER: Q. I JUST WANTED TO ASK YOU A
JUDITH ANN OSSA, CSR NO. 2310

0087

1 COUPLE OF QUICK QUESTIONS ABOUT MIKE WALLACE. THAT WAS ONE
2 WHERE WE SAW SMOKE. WHAT WAS THAT PROGRAM, THE MIKE WALLACE

3 SHOW?
4 A. AN INTERVIEW-NEWS-STYLE PROGRAM, A PRIME TIME
5 PROGRAM WHERE HE WOULD INTERVIEW FAMOUS PEOPLE.
6 Q. AND DID MIKE WALLACE SMOKE THROUGHOUT HIS
7 INTERVIEWS ON CAMERA?
8 A. HE DID. AND HE WAS NOT ALONE IN SO DOING. IT
9 WAS NOT UNCOMMON TO SEE SMOKE DURING THOSE DAYS. THAT WOULD
10 HAVE BEEN FROM THE 1950S.
11 Q. AND SO IT WOULDN'T HAVE BEEN UNCOMMON TO SEE
12 PEOPLE -- WAS MIKE WALLACE A FAMOUS PERSON THEN?
13 A. HE WAS. HE WAS ALREADY A WELL-ESTABLISHED
14 NEWSCASTER.
15 Q. AND WHAT WOULD BE THE EFFECT ON THE CONSUMER
16 EXPECTATION OF SEEING SOMEONE LIKE MIKE WALLACE SMOKING ON
17 TELEVISION?
18 A. WELL, IN BOTH THE CELEBRITY EFFECT OF PEOPLE
19 THINKING THAT CELEBRITIES ARE WORTH IMITATING. BUT ALSO
20 THAT BECAUSE HE WAS IN THE NEWS, HE WAS PRESUMABLY IN THE
21 KNOW; THAT IS, HE WOULD HAVE ACCESS TO PRETTY GOOD SOURCES
22 OF INFORMATION ABOUT THE RISKINESS OF THIS. AND IF HE WAS
23 COMFORTABLE TO SMOKE, WHY SHOULDN'T THE AVERAGE PERSON?
24 Q. NOW WE'VE STARTED ANOTHER ADVERTISEMENT.
25 (VIDEOTAPE PLAYED)
26 MS. CHABER: Q. NOW, TELL US ABOUT THIS
27 ADVERTISEMENT. WHAT PART OF A CAMPAIGN IS IT?
28 A. WELL, THIS IS AN IMAGE FORMAT CAMPAIGN. THERE'S
JUDITH ANN OSSA, CSR NO. 2310

0088

1 ALMOST NO COPY. THEY SAY "COME TO WHERE THE FLAVOR IS.
2 COME TO MARLBORO COUNTRY." MOST OF IT IS THIS LYRICAL
3 SEDATING KIND OF MUSIC.
4 IT KIND OF INTRODUCES THIS NOTION OF PIECE AND
5 CALM AND IMAGERY OF THE WORLD OF THE COWBOY, THAT KIND OF
6 EMPHASIZES THIS KIND OF MYTHOLOGY OF THE COWBOY IN THE WEST,
7 TO DRAW UPON THAT TO ESTABLISH CERTAIN TRAITS; THAT IS, TO
8 GIVE THE BRAND THOSE PROPERTIES, TO MAKE THE BRAND SEEM LIKE
9 IT TOO CONTAINED THE HEROIC AND INDEPENDENT QUALITIES OF THE
10 COWBOY.
11 Q. AND WHAT ARE THE PROPERTIES THAT A CONSUMER COULD
12 COME AWAY FROM THIS AD WITH?
13 A. IT COULD BE SEVERAL. CERTAINLY, IT COULD BE
14 MASCULINITY, BUT IT COULD ALSO BE MORE GENERALLY
15 INDEPENDENCE AND THAT KIND OF FREEDOM FROM AUTHORITY. AND
16 THAT'S GENERALLY HELD TO BE THE REASON FOR THE SUCCESS OF
17 THIS CAMPAIGN.
18 Q. AND IN REVIEWING INDUSTRY DOCUMENTS, HAVE YOU
19 SEEN EVIDENCE THAT PHILIP MORRIS WAS AWARE THAT TEENAGERS
20 WERE INTERESTED IN INDEPENDENCE?
21 A. YES, I HAVE. I'VE SEEN DOCUMENTS FROM A NUMBER
22 OF PLACES BOTH IN AND OUT OF THE INDUSTRY SUGGESTING THAT
23 WHAT MOST PARENTS COME TO LEARN IS THAT THE TYPICAL
24 ADOLESCENT HAS A VERY STRONG NEED FOR INDEPENDENCE, TO BE
25 FREE FROM AUTHORITY, LIKE PARENTS AND TEACHERS.
26 Q. AND THE MARLBORO COUNTRY, HOW DOES THAT REINFORCE
27 THAT NEED?
28 MR. OHLEMEYER: OBJECTION, YOUR HONOR.
JUDITH ANN OSSA, CSR NO. 2310

0089

1 ARGUMENTATIVE.
2 THE COURT: YOU CAN REPHRASE IT. I'LL SUSTAIN.
3 MS. CHABER: Q. THIS NEED FOR INDEPENDENCE, OF
4 TEENAGERS BEING FREE FROM AUTHORITY, WHAT ARE THE THINGS IN
5 THE MARLBORO COUNTRY CAMPAIGN THAT MIGHT HAVE A TENDENCY TO

6 REINFORCE THAT?
7 THE COURT: THAT'S THE SAME QUESTION. LET ME
8 JUST SAY THIS TO BOTH COUNSEL THROUGHOUT THE TRIAL. WHEN I
9 MAKE A RULING AND SUSTAIN AN OBJECTION, PLEASE DON'T ASK THE
10 SAME QUESTION AGAIN. YOU ARE GOING TO HAVE TO EITHER MOVE
11 ON TO SOMETHING ELSE OR GET AT WHAT YOU ARE TRYING TO GO
12 FOR IN A DIFFERENT WAY. LET'S JUST NOT REPEAT THE QUESTION
13 I'M NOT CHASTISING ANYBODY, BUT I WANT TO GET THAT PRACTICE
14 GOING WITH ALL COUNSEL IN THE CASE.
15 MS. CHABER: IT'S POOR REPHRASING, YOUR HONOR.
16 I APOLOGIZE.
17 Q. WHAT IN THE MARLBORO COUNTRY CAMPAIGN
18 DEMONSTRATES INDEPENDENCE OR LACK OF AUTHORITY?
19 A. I'VE SEEN LITERALLY THOUSANDS OF EXECUTIONS OF
20 MARLBORO ADS OVER THE YEARS. WHAT'S NOTABLE IS THE TOTAL
21 ABSENCE OF ANY AUTHORITY; THAT IS, THE ABSENCE OF ANY
22 FOREMEN, ANY BULLIES, ANY OUTLAWS. THERE IS NOT EVEN A
23 SHERIFF IN MARLBORO COUNTRY. THERE IS NO AUTHORITY FIGURE
24 WHATSOEVER, BECAUSE THAT WOULD CONTRADICT THIS NOTION OF
25 INDEPENDENCE. THE MYTH OF THE COWBOY THAT THEY WANT TO
26 PORTRAY IS FREEDOM FROM ALL THIS.
27 MR. OHLEMEYER: EXCUSE ME, YOUR HONOR. AT THIS
28 POINT, IT'S NONRESPONSIVE. IT GETS INTO 801(A).
JUDITH ANN OSSA, CSR NO. 2310

0090

1 THE COURT: ALL RIGHT. GO AHEAD. PLEASE START
2 OVER.
3 MS. CHABER: I'M SORRY, YOUR HONOR. I DIDN'T
4 HEAR THAT.
5 THE COURT: HE RAISED THE OBJECTION OF 801(A).
6 I WAS JUST SUGGESTING THAT I THINK WE'RE GETTING BEYOND THE
7 QUESTION. WHY DON'T YOU START OVER WITH YOUR QUESTION.
8 MS. CHABER: OKAY.
9 THE COURT: OR WITH ANOTHER QUESTION.
10 MS. CHABER: Q. WITH RESPECT TO WHAT HAS BEEN
11 SHOWN IN THIS AND IN OTHER OF THE AD CAMPAIGNS, WHAT WOULD A
12 CONSUMER, A TEENAGED CONSUMER COME AWAY FROM THAT? WHAT
13 WOULD BE THE EFFECT ON THAT TEENAGER?
14 A. THAT IT WOULD BUILD THE BRAND IMAGE THAT PEOPLE
15 WHO SMOKE THIS BRAND WERE DISPLAYING THE PROPERTY OF
16 INDEPENDENCE. THAT'S BEING DONE BY A VARIETY OF EXECUTIONS
17 WHICH WERE CONSISTENT IN NEVER SHOWING ANY KIND OF AUTHORITY
18 FIGURE WHATSOEVER, EVEN THOSE THAT WOULD HAVE BEEN COMMON IN
19 THE WEST, LIKE FOREMEN, LIKE OUTLAWS, LIKE SHERIFFS.
20 Q. I THINK WE HAVE ONE MORE ALONG THE SAME LINES.
21 (VIDEOTAPE PLAYED)
22 MS. CHABER: Q. NOW, IS THIS AN AD THAT IS
23 CONSISTENT WITH WHAT YOU'VE JUST TESTIFIED TO ABOUT
24 INDEPENDENCE AND LACK OF AUTHORITY?
25 A. YES. WE HAVEN'T SEEN MUCH OF THE AD, OF COURSE.
26 WHAT WE SAW WAS THE CONNECTION BETWEEN THE EDITORIAL
27 POSITIONING, THAT IS THE PROGRAM THAT WAS BEING SPONSORED
28 AND THEN THE LEAD-IN TO THE SPONSOR.
JUDITH ANN OSSA, CSR NO. 2310

0091

1 (VIDEOTAPE PLAYED)
2 MS. CHABER: Q. WE HAVE NOW WATCHED IT
3 THROUGH. NOW, YOU SAID THE BEGINNING PART WAS A LEAD-IN
4 FROM THE SHOW RAWHIDE INTO THE COMMERCIAL. CAN YOU TALK
5 ABOUT THAT FOR A MINUTE?
6 A. IT INDICATES THAT THE PROGRAM RAWHIDE, WHICH
7 ITSELF HAD A WESTERN MOTIF, WAS BEING SPONSORED BY
8 MARLBORO. SO THAT POSITIONING IS GENUINELY KNOWN AS PUTTING

9 YOURSELF INTO AN APPROPRIATE OR FRIENDLY EDITORIAL
10 ENVIRONMENT; THAT IS, IF YOUR AD HAS A CERTAIN CHARACTER
11 LEAD-IN, IT'S FUNNY, IT'S NICE, IF IT'S ALSO SITUATED IN A
12 SITCOM. IN THIS CASE, IF YOU HAVE A COWBOY MOTIVE, IT'S
13 NOT, IF YOU'RE SITUATED IN A COWBOY SHOW.
14 Q. AND WOULD ANYONE WATCHING RAWHIDE THEN BE ABLE TO
15 SEE THESE COMMERCIALS FOR THE MARLBORO IMAGE FROM THE SHOW?
16 A. IF YOU WATCH THE SHOW, YOU WOULD SEE SEVERAL SUCH
17 COMMERCIALS. YOU'D SEE THE SIGN-ON AND SIGN-OFF AS WELL AS
18 ANY FULL COMMERCIALS, 30 SECOND OR 60 SECOND, AS SOME OF
19 THESE WERE WITHIN THE SHOW.
20 MS. CHABER: I CAN'T REMEMBER IF THERE WERE
21 ANYMORE. I THINK THAT MAY BE THE LAST ONE. NO. I THINK
22 THAT'S THE LAST ONE, YOUR HONOR.
23 THE COURT: ARE WE GOING TO BE USING THE SCREEN
24 IN THE NEXT FEW MINUTES?
25 MS. CHABER: THE TV? NO.
26 THE COURT: BECAUSE IF NOT, MAYBE SOMEBODY COULD
27 MOVE IT. I'D LIKE TO GO FOR A FEW MORE MINUTES, IF YOU
28 DON'T MIND, BUT I WOULD LIKE -- IS IT EASY TO MOVE THAT?
JUDITH ANN OSSA, CSR NO. 2310

0092

1 MS. CHABER: NO, IT'S NOT.
2 THE COURT: IT'S NOT. ALL RIGHT. THEN WE'LL
3 MOVE IT DURING THE RECESS.
4 MS. CHABER: WE CAN CERTAINLY MOVE IT BACK
5 QUICKLY, YOUR HONOR.
6 THE COURT: BUT IT IS HARD TO MOVE?
7 MS. CHABER: WE'VE DONE IT, THOUGH.
8 THE COURT: I'D JUST PREFER TO BE ABLE TO SEE
9 COUNSEL, ALL OTHER THINGS BEING EQUAL. JUST FOR EASE OF OUR
10 EYES, YOU MAY WANT TO TURN THE SCREEN LIGHTS OFF, UNLESS YOU
11 ARE USING THEM.
12 MS. CHABER: WE'RE ABOUT TO.
13 THE COURT: YOU ARE ABOUT TO.
14 MS. CHABER: WE'RE ABOUT TO USE SOME ADDITIONAL
15 ONES.
16 Q. IN TERMS OF THE ATTRACTION TO YOUTH AND
17 TEENAGERS, WE TALKED ABOUT THAT WITH RESPECT TO INDEPENDENCE
18 AND AUTHORITY. WERE THESE ADS ONLY RECEIVED BY THE
19 CONSUMER, MALE CONSUMERS, OR DID FEMALE CONSUMERS LIKEWISE
20 SMOKE MARLBORO?
21 A. AS I HEAR IT, THERE MAY BE TWO QUESTIONS IN
22 THERE. ONE IS AUDIENCE EXPOSURE AS WELL AS THE SMOKING
23 RESULTS. CERTAINLY THEY WERE BROADCAST TO A MASS AUDIENCE,
24 SO THAT PEOPLE OF ALL AGES AND BOTH SEXES WOULD BE SEEING
25 THIS CAMPAIGN AND BE SEEING IT IN MULTIPLE PLACES; THAT IS,
26 IN THESE DAYS ON TV, BUT ALSO IN STORES AND BUSES AND
27 BILLBOARDS AND SO ON.
28 AND IN ANSWER TO THE OTHER PART OF YOUR QUESTION,
JUDITH ANN OSSA, CSR NO. 2310

0093

1 YES, WOMEN WERE DEFINITELY ATTRACTED TO THIS ADVERTISING.
2 MARLBORO WAS THE NO. 1 BRAND CHOICE AMONG YOUNG WOMEN.
3 Q. WHEN YOU SAY "YOUNG," WITHIN WHAT AGE CATEGORY
4 ARE YOU TALKING ABOUT?
5 A. IN MINORS.
6 Q. AND I JUST WANT TO LOOK AT A COUPLE OF OTHER
7 MARLBORO ADS. NOW, THIS IS A MORE MODERN VINTAGE, AND I
8 BELIEVE WE'RE LOOKING AT 19-7-K?
9 A. YES. AND THE DATE OF THIS IS 1991. THAT I CAN
10 READ ON MY COPY. TO SHOW THE EXTENSION OF THIS CAMPAIGN,
11 MARLBORO HAS BEEN DOING SOME THINGS THAT AT FIRST BLUSH

12 LOOKED SOMEWHAT INCONSISTENT WITH THE COWBOY THEME. THEY
13 HAVE BEEN SPONSORING RACE CAR TEAMS AND RACING TEAMS IN A
14 VARIETY OF RACING SPORTS, THAT IS MOTORCYCLES, A VARIETY OF
15 FORMULAS OF RACE CARS.

16 BUT ACCORDING TO THEIR OWN DOCUMENTS, THAT THIS
17 IS CAPTURING THE SAME QUALITY OF HEROICS, INDEPENDENCE.
18 THIS IS A MODERN DAY VERSION OF THE MARLBORO MAN. THAT IS,
19 PEOPLE WHO RIDE THESE MOTORCYCLES ARE LIKE THE MEN OF THE
20 OLD WEST WHO RODE THEIR HORSES. SO THESE ARE THE MODERN-DAY
21 EQUIVALENCE OF HEROES.

22 Q. I'LL PUT UP 19-7-L. AND IS THIS PART OF WHAT YOU
23 WERE JUST TALKING ABOUT, ABOUT THE MODERN-DAY EQUIVALENCE?

24 A. YES, IT IS. AND IT ALSO DEMONSTRATES THE ABILITY
25 OF THIS TO GET PUBLICITY; THAT IS, TO GET MEDIA EXPOSURE
26 WHERE YOU DON'T HAVE TO PAY FOR THE PAGE IN THE MAGAZINE.

27 Q. THIS ISN'T AN ADVERTISEMENT?

28 A. THIS IS NOT ADVERTISEMENT, SO THERE IS NO WARNING
JUDITH ANN OSSA, CSR NO. 2310

0094

1 IN IT OR ANYTHING. IT'S JUST AN ARTICLE ABOUT THESE RACE
2 CAR DRIVERS.

3 Q. AND BASICALLY, THE COLORS OF THE UNIFORMS THAT
4 THE RACE CAR DRIVERS ARE WEARING ARE THE CHEVRON OF THE
5 MARLBORO?

6 A. THAT'S CORRECT. THEY ECHO BRAND DESIGN. OF
7 COURSE, THE SPELLING OF MARLBORO WAS DONE IN EXACTLY THE
8 SAME FONT AS ON THE PACKAGE AND SO ON.

9 Q. AND ON THE HATS AS WELL?

10 A. YES.

11 Q. AND SO IS THIS SOMETHING THAT ALSO -- ALTHOUGH
12 ADVERTISEMENTS OF CIGARETTES ARE NO LONGER ON TV, SOMETHING
13 LIKE THIS MIGHT BE BROADCAST ON TV?

14 A. YES, DEFINITELY. AND COVERED BOTH AS LIVE EVENTS
15 AND HIGHLIGHTS ON THE EVENING NEWS, PARTICULARLY IN THE
16 SPORTS SECTIONS.

17 Q. AND THIS IS 7-N, 19-7-N?

18 A. YES. THIS WOULD BE --

19 Q. WHAT DOES THAT REPRESENT?

20 A. JUST A PROLIFERATION OF CIGARETTE ADVERTISING AT
21 RETAIL SIGNAGE. IN FACT, VIRTUALLY EVERYTHING YOU SEE IS A
22 CIGARETTE AD EXCEPT FOR MILK IN THE LOWER RIGHT-HAND
23 CORNER. MAYBE THERE ARE SOME OTHER EXCEPTIONS. BUT THE
24 UPPER LEFT IS NEWPORT PLEASURE, IN THE MIDDLE OF THE UPPER
25 PAGE IS CAMEL, THE RIGHT IS MARLBORO.

26 THE MARLBORO DESIGN IS MORE EFFECTIVE, IN MY
27 JUDGMENT, BECAUSE OF ITS ABILITY TO STAND OUT BECAUSE OF THE
28 CLEANNES OF THE STYLISTIC DESIGN.

JUDITH ANN OSSA, CSR NO. 2310

0095

1 Q. AND THAT'S JUST THE RED, WHITE AND THE WORDS?

2 A. THE VERY SIMPLICITY OF IT MAKES IT EASILY
3 APPRECIATED AND UNDERSTOOD, EVEN AT A DISTANCE, WHEREAS THE
4 OTHERS YOU SORT OF HAVE TO GET A LITTLE CLOSER AND LOOK AT
5 IT IN A LITTLE MORE DETAIL.

6 Q. AND IT'S ALSO REPEATED AGAIN IN OTHER AREAS IN
7 THIS PARTICULAR PHOTO?

8 A. YES, IT IS. LIKE I SAY, THIS IS A CONVENIENCE
9 STORE. THIS IS THE TYPE OF PLACE WHERE ONE GOES TO BUY MILK
10 AND BREAD AND THINGS LIKE THAT ON A CONVENIENT BASIS.

11 Q. AND 7-P.

12 A. YES. THIS IS ESSENTIALLY THE SAME IDEA, THAT IS
13 THE PRESENCE OF CIGARETTE ADVERTISING IN THE MIDST OF OTHER
14 PROMOTIONS, IN THIS CASE CANDY AND MILK. THE IMPORTANT

15 POINT OF THIS IS TO CREATE WHAT LEO BURNETT, THE MARLBORO
16 ADVERTISING AGENT, CALLED FRIENDLY FAMILIARITY.
17 Q. WHAT DOES THAT MEAN?
18 A. THAT WE SEE THIS ADVERTISING SO OFTEN, WE TAKE IT
19 FOR GRANTED. THE MORE WE SEE SOMETHING, THE MORE WE PRESUME
20 IT TO BE RELATIVELY SAFE. WE ALL KNOW THE OPPOSITE OF
21 THAT. WHEN WE ENCOUNTER SOMETHING FOR THE FIRST TIME, WE
22 TEND TO BE A BIT SUSPICIOUS OF IT, BUT THE REVERSE IS ALSO
23 TRUE. THE MORE FREQUENTLY WE SEE SOMETHING, THE MORE WE
24 TEND TO TAKE IT FOR GRANTED AND JUST PRESUME THAT IT'S A
25 PART OF EVERYDAY LIFE. IT CAN'T BE ALL THAT BAD.
26 Q. NOW I WANTED TO DIRECT YOUR ATTENTION TO SOME
27 MAGAZINES IN THE BACK, AND I THINK YOU ACTUALLY HAVE THE
28 EXHIBIT NUMBERS ON THEM, AND THEY ARE LOOK MAGAZINE AND LIFE
JUDITH ANN OSSA, CSR NO. 2310

0096

1 MAGAZINE?
2 A. YES.
3 Q. AND SATURDAY EVENING POST. AND I'LL REPRESENT
4 THAT THESE ARE COPIES FROM THE ACTUAL MAGAZINES.
5 THE COURT: COUNSEL, YOU ARE NOT TESTIFYING.
6 MS. CHABER: ALL RIGHT.
7 Q. WHAT DO THESE REPRESENT?
8 A. THEY ARE COVERS, THE FRONT COVERS AND I BELIEVE
9 THE BACK COVERS OF VARIOUS ISSUES OF MAGAZINES AND ALL OF
10 THE CIGARETTE ADS THAT MIGHT HAVE BEEN INCLUDED OR PRESENT
11 IN THOSE SAME MAGAZINES.
12 Q. OKAY. AND THIS IS ONE FROM 1965. I THINK IN THE
13 BOTTOM, IT SAYS APRIL 30, 1965.
14 THE COURT: WHAT'S THE NUMBER?
15 THE WITNESS: 19-9 IS WHERE I SHOW IT.
16 MS. CHABER: Q. AND CAN YOU GIVE US AN IDEA OF
17 HOW MANY -- CAN YOU GIVE US AN IDEA OF HOW MANY CIGARETTE
18 ADVERTISEMENTS WERE IN THIS ONE ISSUE OF THE APRIL 30TH,
19 1965 LIFE MAGAZINE?
20 A. IN THIS WEEK'S ISSUE, THERE WERE SIX CIGARETTE
21 ADS. THIS WAS A WEEKLY MAGAZINE, SO THERE WOULD BE A FRESH
22 COPY IN THE SUBSEQUENT WEEK.
23 Q. AND ONE OF THOSE ADS WAS A MARLBORO AD?
24 A. YES. AN AD THAT'S QUITE RED THROUGHOUT.
25 Q. AND AGAIN, THE RED AND WHITE CHEVRON DOMINATES?
26 A. YES. THE PACKAGE IS PROMINENT IN THE AD.
27 Q. WE'RE HAVING A FIGHT OVER STRAIGHTNESS, YOUR
28 HONOR (REFERRING TO MS. WHITE).

JUDITH ANN OSSA, CSR NO. 2310

0097

1 FIRST OF ALL, THERE'S A SERIES OF MAGAZINES HERE
2 THAT RUN IN THE 1960'S AND 1970'S; IS THAT CORRECT?
3 A. YES.
4 Q. AND THE EARLY 1970'S. DID YOU SEE ANY EVIDENCE
5 OF WARNINGS ON ANY OF THOSE ADS?
6 A. NO, NONE WHATSOEVER.
7 Q. WHAT WOULD THE EFFECT ON THE CONSUMER BE OF
8 SEEING FIVE OR SO ADS IN A WEEKLY MAGAZINE WITH NO WARNINGS?
9 A. WELL, INDEPENDENT OF WHAT THE AD SAID, JUST THAT
10 VOLUME OF ADVERTISING WOULD BE REASSURANCE, CREATING WHAT WE
11 CALLED -- LEO BURNETT CALLED THIS FRIENDLY FAMILIARITY. AND
12 THE FACT THAT IT DIDN'T SEEM TO NEED WARNINGS, THAT IS, NO
13 GOVERNMENTAL AGENCY WAS REQUIRING WARNINGS WOULD SUGGEST
14 THAT THE HEALTH ISSUES, WHATEVER THEY MIGHT BE, WEREN'T ALL
15 THAT SERIOUS.
16 Q. AND THE MAGAZINE THAT I'M HOLDING UP, IS THIS
17 LIFE MAGAZINE OF FEBRUARY 19TH, 1971.

18 A. YES, AT TAB-20.
19 Q. OKAY. SO THAT'S 19-20. AND THE BACK COVER AD OF
20 THAT MAGAZINE?
21 A. ANOTHER RENDITION FROM THE MARLBORO CAMPAIGN WITH
22 THE SAME COPY WE SAW OPENING THE TELEVISION AD "COME TO
23 WHERE THE FLAVOR IS. COME TO MARLBORO COUNTRY."
24 Q. AND THE FRONT COVER OF THE MAGAZINE, IS IT
25 INDICATED WHERE THAT MAGAZINE WAS GOING TO?
26 A. YES, TO AZUSA HIGH SCHOOL LIBRARY, AZUSA,
27 CALIFORNIA.
28 Q. WHAT WOULD BE THE EFFECT ON A TEENAGER GOING TO
JUDITH ANN OSSA, CSR NO. 2310

0098

1 THEIR HIGH SCHOOL LIBRARY AND SEEING MAGAZINES WITH
2 CIGARETTE ADVERTISING WITH NO WARNINGS ON IT?
3 A. WELL, THE PARTICULAR ISSUE WOULD HAVE HAD SEVEN
4 PAGES OF CIGARETTE ADVERTISING AND WITH THE ABSENCE OF
5 WARNINGS WOULD COMMUNICATE THAT THERE WAS NOTHING ALL THAT
6 SERIOUS ABOUT SMOKING AS A HEALTH ISSUE.
7 Q. WERE THERE OTHER PROMOTIONAL THINGS DONE IN THE
8 1960'S WITH RESPECT TO CIGARETTES?
9 A. I'M NOT SURE WHAT YOU MEAN.
10 Q. THINGS OTHER THAN ADVERTISEMENTS.
11 A. WELL, THERE WAS CERTAINLY ONGOING PUBLIC
12 RELATIONS EFFORTS. THERE WAS POINT OF SALE MERCHANDISING
13 ACTIVITIES GOING ON IN STORES THAT WE MIGHT NOT THINK OF AS
14 ADVERTISEMENTS BUT WOULD BE PAID FOR BECAUSE OF THEIR
15 CAPACITY TO MERCHANDISE THE MERCHANDISE.
16 Q. AND ARE YOU AWARE OF WHETHER OR NOT THERE IS
17 MOVIE PLACEMENT OR PLACEMENT OF ADVERTISING IN MOVIES?
18 A. YES, THERE HAS BEEN. PRODUCT PLACEMENT IT'S
19 CALLED, GENERALLY ENGAGED IN BY BOTH THE TOBACCO INDUSTRY
20 AND OTHER INDUSTRIES.
21 Q. AND ARE YOU AWARE OF MOVIE PLACEMENT BY CIGARETTE
22 COMPANIES --
23 A. YES.
24 Q. -- OF THEIR PARTICULAR PRODUCT?
25 A. YES. I KNOW OF SEVERAL EXAMPLES.
26 Q. OKAY. CAN YOU GIVE US THOSE EXAMPLES?
27 A. SUPERMAN II HAD PRODUCT PLACEMENTS FOR THE
28 MARLBORO BRAND AND HAD THE SCRIPT REWRITTEN TO MAKE LOIS
JUDITH ANN OSSA, CSR NO. 2310

0099

1 LANE, SUPERMAN'S GIRLFRIEND, A SMOKER TO BE CONSISTENT WITH
2 THE SCRIPT AND THEN SHOWED MARLBORO IN OTHER WAYS. SOME OF
3 THE CRASH SCENES HAD MARLBORO TRUCKS INVOLVED. THERE WOULD
4 BE BILLBOARDS VISIBLE IN OTHER SCENES. SO THERE WERE
5 SEVERAL OCCASIONS DURING THE COURSE OF THE MOVIE WHERE THERE
6 WERE THESE EXPOSURES TO MARLBORO ADVERTISING.
7 Q. AND THOSE MARLBORO TRUCKS OR ADS OR PACKS THAT
8 WERE SHOWN THROUGHOUT A MOVIE, WOULD THOSE HAVE WARNINGS ON
9 THEM --
10 A. NOT THAT I RECALL.
11 Q. -- THAT WOULD BE VISIBLE?
12 A. POSSIBLY ON THE TRUCK THERE MIGHT HAVE BEEN
13 SOMETHING IN SMALL PRINT, IF YOU COULD FREEZE THE FRAME AND
14 FIND IT, BUT NOT THAT WOULD BE NOTICEABLE TO THE VIEWER OF
15 THE MOVIE.
16 Q. AND IS THAT AN ISOLATED INCIDENCE OF MOVIE
17 PLACEMENT OF PARTICULAR BRANDS?
18 A. NO, IT'S NOT. IT HAS BEEN A FAIRLY COMMON
19 PRACTICE.
20 Q. AND WHAT IS THE EFFECT ON THE CONSUMER OF SEEING

21 BRANDS IN A MOVIE?
22 A. I THINK IT'S TWOFOLD. ONE IS THE CELEBRITY
23 IMPLICATION; THAT IS, THE PEOPLE WHO ARE STARS IN THE MOVIE
24 ARE OFTEN THE ONES SHOWN SMOKING THE PRODUCT. SO THERE'S
25 THAT GLAMOROUSNESS ASSOCIATED WITH IT.
26 AND THEN IT'S ALSO JUST SEEN AS PART OF THE
27 COMMONPLACE OF LIFE; THAT IS, WE DON'T REACT TO SOMETHING WE
28 SEE ACCIDENTALLY LIKE THAT IN THE SAME WAY WE MIGHT REACT TO
JUDITH ANN OSSA, CSR NO. 2310

0100

1 ADVERTISING.
2 Q. AND WHY IS THAT?
3 A. WE SEE IT AS NATURAL; THAT IS, IT'S PART OF THE
4 NATURAL ENVIRONMENT. THESE PEOPLE ARE SMOKERS. AND IT
5 HELPS TO COMMUNICATE TO VIEWERS THE IDEA THAT LOTS OF PEOPLE
6 ARE SMOKERS, INCLUDING CELEBRITIES, THAT SMOKING IS
7 SOMETHING ENGAGED IN BY THE RICH AND FAMOUS AS WELL AS THE
8 MAN OR WOMAN NEXT DOOR.
9 Q. IS THERE ANY EVIDENCE THAT CIGARETTE
10 ADVERTISEMENTS ARE TO GET PEOPLE ALREADY SMOKING TO SWITCH
11 BRANDS?
12 A. FOR A FEW BRANDS. THERE IS IN THE MARKETING
13 DOCUMENTS AN INDICATION THAT "THE PURPOSE OF THIS
14 ADVERTISING CAMPAIGN IS TO ATTRACT THE SMOKERS OF THIS
15 COMPETITOR PRODUCT TO SWITCH TO OUR PRODUCT." BUT ON THE
16 WHOLE, THAT'S A FAIRLY RARE PHENOMENON; THAT IS, THE BULK OF
17 ADVERTISING IS DISPROPORTIONATELY FOR STARTER BRANDS, NOT
18 FOR SWITCHER BRANDS.
19 Q. HAVE YOU LOOKED AT PHILIP MORRIS DOCUMENTS WITH
20 AN EYE TOWARDS WHETHER THEIR ADVERTISING WAS TO GET PEOPLE
21 TO SWITCH BRANDS OR TO START THE BRAND?
22 MR. OHLEMEYER: I OBJECT, YOUR HONOR, ON 801(A).
23 THE COURT: SUSTAINED.
24 MS. CHABER: Q. WHAT IS THE CONCEPT OF BRAND
25 LOYALTY?
26 A. BRAND LOYALTY IS THE TERM USED IN MARKETING TO
27 REFER TO PEOPLE'S TENDENCY TO STAY WITH A PARTICULAR BRAND;
28 THAT IS, TO BUY THE SAME BRAND AGAIN AND AGAIN AND AGAIN,
JUDITH ANN OSSA, CSR NO. 2310

0101

1 EVEN, SAY, DESPITE INCONVENIENCES, LIKE MAYBE THE STORE IS
2 OUT OF STOCK, SO YOU HAVE TO GO TO A DIFFERENT STORE, OR
3 "IT'S A LITTLE MORE EXPENSIVE BUT I'LL BUY IT ANYWAY." SO
4 IT'S A MEASURE OF PEOPLE'S REPEAT PURCHASING PATTERNS.
5 Q. HAVE YOU ANALYZED WHETHER MARLBORO HAS BRAND
6 LOYALTY?
7 A. MARLBORO HAS PHENOMENAL BRAND LOYALTY. IN FACT,
8 CIGARETTES AS A CLASS HAVE VERY HIGH BRAND LOYALTY, HIGHER
9 THAN ANY OTHER PRODUCT WE HAVE KNOWN OR MEASURED.
10 Q. WITH RESPECT TO MARLBORO, WHAT SEGMENT OF THE
11 POPULATION HAS THE GREATEST BRAND LOYALTY TO MARLBORO?
12 A. WELL, BRAND LOYALTY IS A DYNAMIC PHENOMENON.
13 THERE TENDS TO BE A PROCESS AMONG STARTERS WHERE THERE IS A
14 BIT OF SAMPLING AND THEN THE BRAND PATTERN SETTLES DOWN.
15 AND ONCE YOU LOCK IN A BRAND, THEN YOU TEND TO STAY FIERCELY
16 LOYAL TO THAT BRAND FOR DECADES.
17 BUT IN THE CASE OF CIGARETTES, THERE'S ANOTHER
18 DYNAMIC THAT HAPPENS IN MIDDLE AGE. AS PEOPLE BECOME OLDER,
19 FRIENDS BECOME SICK OR THEY START TO GET SYMPTOMS, WHERE
20 THEY START TO BECOME MORE HEALTH ANXIOUS, AND AT THAT OLDER
21 AGE THEN THEY MAY START TO THINK ABOUT "WELL, MAYBE I'LL
22 SWITCH TO A MILD OR AN ULTRA-LIGHT OR HIGH FILTRATION
23 PRODUCT OF SOME KIND."

24 SO DURING MOST OF ADULthood, THERE IS PRETTY
25 FIERCE LOYALTY AFTER, YOU KNOW, ADOLESCENT EXPERIMENTATION,
26 AND THEN A BIT OF CHANGING AS PEOPLE GET TO MIDDLE AGE AND
27 OLDER, WHERE THEY BECOME HEALTH CONCERNED AND HEALTH
28 ANXIOUS, THEY SEARCH FOR A PRODUCT THEY PERCEIVE TO BE

JUDITH ANN OSSA, CSR NO. 2310

0102

1 SAFER.

2 Q. HAVE YOU LOOKED AT A COMPARISON BETWEEN THE
3 DOLLARS EXPENDED ON -- STRIKE THAT. LET ME START OVER
4 AGAIN.

5 HAVE YOU LOOKED AT A COMPARISON BETWEEN THE
6 AMOUNT OF ADVERTISING IN THE DECADES FROM THE 1950'S TO THE
7 PRESENT COMPARED TO -- I WON'T TAKE IT UP TO THE PRESENT --
8 LET'S TAKE IT TO THE 1970'S? HAVE YOU LOOKED AT A
9 COMPARISON OF THE AMOUNT OF ADVERTISING THAT THE AVERAGE
10 CONSUMER WOULD SEE IN COMPARISON WITH THE AMOUNT OF ARTICLES
11 OR INFORMATION ADVISING THOSE CONSUMERS THAT CIGARETTES
12 CAUSE CANCER OR OTHER SERIOUS DISEASE?

13 A. YES, I HAVE, PAYING PARTICULAR ATTENTION TO THE
14 FORMER; THAT IS, DOING CONSIDERABLE EFFORT TO GET AS PRECISE
15 AN ESTIMATE AS I COULD ON HOW MANY TIMES PEOPLE WOULD SEE
16 ADVERTISING.

17 Q. AND CAN YOU TELL US WHAT THAT IS?

18 A. GENERALLY SPEAKING, SAY DURING THE '60S, PEOPLE,
19 JUST AVERAGE CITIZENS LIVING IN THE COMMUNITY, WOULD SEE
20 SOMETHING OF ABOUT FIVE OR MORE CIGARETTE ADS A DAY, JUST
21 WATCHING TELEVISION ALONE. ACTUAL NETWORK TELEVISION, THE
22 AVERAGE PERSON WAS SEEING ABOUT THREE A DAY. THEN IN
23 ADDITION, THERE WAS OTHER ADVERTISING ON BILLBOARDS AND
24 MAGAZINES AND SO ON.

25 SO THE BEST ESTIMATE IS ABOUT FIVE TIMES A DAY
26 YOU WOULD SEE CIGARETTE INDUCEMENTS TO SMOKE; THAT IS,
27 ADVERTISEMENTS AND OTHER KINDS OF EXPOSURE TO CIGARETTE
28 PROMOTIONAL ACTIVITIES.

JUDITH ANN OSSA, CSR NO. 2310

0103

1 ON THE OTHER SIDE OF THE COIN, WHEN I LOOKED IN
2 NEWSPAPER FILES, I SEE RELATIVELY FEW. I MEAN, YOU'D BE
3 LUCKY TO FIND FIVE SERIOUS ARTICLES IN THE AVERAGE YEAR IN
4 THE TYPICAL NEWSPAPER. SO EVEN IF YOU WERE READING THAT
5 NEWSPAPER COVER TO COVER EVERY DAY, YOU PROBABLY WOULDN'T
6 SEE FIVE SERIOUS WARNING ARTICLES IN THE ENTIRE YEAR.

7 MS. CHABER: LET ME JUST FINISH UP A LITTLE BIT
8 ON THE MARLBORO HERE AND MAYBE WE CAN TAKE A BREAK, BECAUSE
9 I'M GOING TO CHANGE TOPICS.

10 THE COURT: OKAY.

11 MS. CHABER: I'D ASK TO HAVE MARKED -- OH, THEY
12 ARE MARKED. IN BINDER 19, THERE ARE PHOTOCOPIES OF PACKAGES
13 THAT SAY "MARLBORO SPECIAL GEAR OFFER."

14 THE COURT: FROM SOME SOURCE, CAN WE GET THE
15 NUMBER?

16 MS. CHABER: YES. 19.

17 THE WITNESS: I THINK 25 AND 26.

18 MS. CHABER: YES.

19 Q. WHAT DO THOSE REPRESENT?

20 A. A TYPE OF PROMOTIONAL CAMPAIGN; THAT IS, THE GEAR
21 REFERRED TO IS A VARIETY OF MERCHANDISE BEARING MARLBORO
22 PROMOTIONAL MATERIALS THAT COULD BE ACQUIRED FROM A CATALOG
23 BY REDEEMING PROOFS OF PURCHASE.

24 Q. AND THE PROOFS OF PURCHASE ARE ON THE SIDE OF THE
25 PACKS?

26 A. YES. HERE THEY'VE SAID "MARLBORO UNLIMITED

27 SYMBOL." OTHER TIMES THEY HAVE BEEN CALLED "MARLBORO
28 MILDS."

JUDITH ANN OSSA, CSR NO. 2310

0104

1 Q. AND PEOPLE COULD COLLECT THESE AND THEN EXCHANGE
2 THEM FOR PARAPHERNALIA THAT BORE THE MARLBORO NAME?

3 A. YES. QUITE EASILY. I MEAN, IT ONLY TOOK THREE
4 SUCH PROOFS OF PURCHASE TO ACQUIRE A T-SHIRT.

5 Q. AND WERE THEY THE ONLY ONES THAT DID THAT KIND OF
6 COUPON IN EXCHANGE FOR MERCHANDISE?

7 A. NO. THE CLOSEST COMPETITOR FOR THE STARTERS'
8 MARKET, CAMEL ALSO HAD A CAMEL CASH PROGRAM.

9 Q. AND THAT WAS THE SAME TYPE OF THING?

10 A. SAME CONCEPT. THERE THE CERTIFICATES WERE MADE
11 TO LOOK LIKE A KIND OF CASH.

12 Q. ARE THERE OTHER MEANS OF COMMUNICATION --
13 THE COURT: LET ME JUST SAY WHEN YOU GET TO A
14 LOGICAL BREAKING POINT, YOU LET US KNOW.

15 MS. CHABER: OKAY.

16 THE COURT: OKAY.

17 MS. CHABER: Q. ARE THERE OTHER MEANS OF
18 COMMUNICATION FROM CIGARETTE COMPANIES, SUCH AS MARLBORO, TO
19 CONSUMERS OUTSIDE OF ADVERTISING AND PROMOTION?

20 A. YES. IN FACT, THESE DAYS THEY'RE DOING MORE AND
21 MORE DIRECT MAIL. ALTHOUGH SOME PEOPLE WOULD CALL IT THAT,
22 IT'S JUST A FORM OF PROMOTION OR A FORM OF ADVERTISING. BUT
23 IT'S NOT THE TYPE WE NORMALLY THINK OF WHEN WE TALK ABOUT
24 ADVERTISING. SO BY USING THE MAILS, YOU CAN SEND SPECIAL
25 OFFERS TO CONSUMERS AND OTHER ENTICEMENTS TO ENCOURAGE THEIR
26 TRADE.

27 Q. ARE THERE MEANS OF PROVIDING WARNING OR
28 INFORMATION -- STRIKE THAT. ARE THERE OTHER MEANS OF

JUDITH ANN OSSA, CSR NO. 2310

0105

1 PROVIDING INFORMATION ABOUT HEALTH RISKS OF CIGARETTE
2 SMOKING OUTSIDE OF ADVERTISING AND PROMOTION?

3 A. CERTAINLY THEY COULD USE ANY OF THE ADVERTISING
4 AND PROMOTIONAL VEHICLES, BUT THEY COULD USE THEIR DIRECT
5 MAILING LISTS OR PACKAGE INSERTS COULD PROVIDE DETAILS OF A
6 WEALTH OF INFORMATION. IT WOULD BE EASILY COMMUNICATED.

7 MS. CHABER: THIS WOULD BE A GOOD TIME, YOUR
8 HONOR.

9 THE COURT: OKAY. JURORS, LET'S TAKE A 20-
10 MINUTE RECESS TILL 25 MINUTES TO 4:00. PLEASE CONTINUE TO
11 FOLLOW THE ADMONITION. WE'LL SEE YOU BACK AT 25 TO 4:00,
12 AND THEN WE'LL GO TO THE END OF THE DAY, AROUND 5:00
13 O'CLOCK. SO WE'LL SEE YOU ABOUT 25 TO 4:00.

14 (RECESS TAKEN FROM 3:15 TO 3:35 P.M.)

15 THE COURT: WE'RE BACK ON THE RECORD. DURING
16 THE RECESS, ONE OF THE JURORS ASKED ME A QUESTION AND IT'S A
17 GOOD QUESTION, BUT IT'S ONE THAT I CANNOT ANSWER DIRECTLY.

18 LET ME TELL YOU ALL WHAT THE QUESTION WAS AND WHY
19 I'M NOT ANSWERING IT DIRECTLY. THE QUESTION WAS "WHAT IS
20 801(A)?" AND 801(A) IS A SHORTHAND EXPRESSION THAT MR.
21 OHLEMEYER HAS USED A COUPLE OF TIMES IN MAKING OBJECTIONS TO
22 ME. IT'S THE LEGAL GROUNDS FOR THE OBJECTION. IT'S A
23 SHORTHAND EXPRESSION.

24 AND YOU MAY RECALL THAT IN THE PRELIMINARY
25 INSTRUCTIONS AT THE BEGINNING OF THE CASE, ONE OF THE THINGS
26 THAT I TOLD YOU IS THAT YOU MAY NOT SPECULATE AS TO THE
27 ANSWERS TO QUESTIONS TO WHICH OBJECTIONS ARE SUSTAINED OR AS
28 TO THE REASONS FOR THE OBJECTIONS.

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0106

1 THAT REFERENCE TO THOSE NUMBERS IS A SHORTHAND
2 EXPRESSION OF THE REASONS FOR THE OBJECTION. SO I'M NOT
3 GOING TO ANSWER YOUR QUESTION, BECAUSE IT HAS NOTHING TO DO
4 WITH THE JOB THAT WE'RE ASKING YOU TO DO IN THIS CASE. YOU
5 OUGHT NOT TO CONCERN YOURSELVES WITH THE REASONS FOR ANY OF
6 THE OBJECTIONS OR FOR THAT MATTER WHAT THE ANSWERS WOULD
7 HAVE BEEN TO QUESTIONS WHEN I SUSTAIN AN OBJECTION.

8 SO IT'S A GOOD QUESTION, BUT IT FALLS INTO THE
9 CATEGORY THAT I TOLD YOU AT THE OUTSET THERE MAY BE SOME
10 THAT I CAN'T ANSWER. SO THAT'S ONE OF THEM THAT I'M NOT
11 GOING TO ANSWER BECAUSE IT'S NOT PRODUCTIVE IN TERMS OF WHAT
12 WE NEED OR WHAT YOUR JOB IS IN THIS PARTICULAR CASE.

13 OKAY. YOU MAY PROCEED MS. CHABER.

14 MS. CHABER: THANK YOU, YOUR HONOR.

15 Q. DR. POLLAY, I JUST WANT TO WRAP UP WHAT WE WERE
16 TALKING ABOUT EARLIER. DO YOU HAVE AN OPINION, BASED ON
17 YOUR KNOWLEDGE, SKILL, TRAINING, EXPERIENCE, RESEARCH,
18 TEACHING, AS TO WHAT EFFECT, IF ANY, THE ADVERTISING
19 PROMOTION, TV PROGRAMMING AND OTHER THINGS THAT WE'VE TALKED
20 ABOUT IN THE 1950S AND '60S WOULD HAVE ON THE AVERAGE
21 CONSUMER AND THEIR EXPECTATION WITH RESPECT TO THE MAGNITUDE
22 OR SERIOUSNESS OF HEALTH RISKS OF SMOKING CIGARETTES?

23 A. I DO.

24 Q. AND WHAT IS THAT OPINION?

25 A. THAT THE RESULT OF THAT ADVERTISING, BOTH BECAUSE
26 OF ITS CHARACTER AND ITS VOLUME, WOULD HAVE BEEN TO LULL
27 CONSUMERS INTO A FALSE SENSE OF SECURITY, GIVING THEM THE
28 IMPRESSION THAT THERE WAS NOTHING SERIOUS ENOUGH TO WARRANT
JUDITH ANN OSSA, CSR NO. 2310

0107

1 ANY WARNING AND LEADING THEM TO BELIEVE THAT CIGARETTES
2 WEREN'T ALL THAT HAZARDOUS. AND I FIND THE ADVERTISING
3 ESSENTIALLY TO BE DECEPTIVE AND MISLEADING.

4 MR. OHLEMEYER: OBJECTION, YOUR HONOR. MOVE TO
5 STRIKE EVERYTHING AFTER THE LAST -- EVERYTHING THAT PRECEDED
6 THE LAST SENTENCE.

7 THE COURT: ALL RIGHT. YOU ARE ASKING ME TO
8 STRIKE THE LAST SENTENCE, NOT PRECEDING IT; CORRECT?

9 MR. OHLEMEYER: CORRECT.

10 THE COURT: I WILL STRIKE THE LAST SENTENCE AND
11 I'LL LEAVE THE REMAINDER OF THE ANSWER.

12 MS. CHABER: Q. DR. POLLAY, YOU HAD MENTIONED
13 EARLIER AND WE'VE ALLUDED TO AND TALKED ABOUT A HEALTH SCARE
14 IN THE EARLY 1950S. WHAT WERE YOU REFERRING TO?

15 A. THERE WAS A SCIENTIFIC STUDY THAT WAS THEN GIVEN
16 SOME POPULAR VISIBILITY BY A PUBLICATION IN THE READER'S
17 DIGEST CALLED "CANCER BY THE CARTON" THAT OCCURRED IN
18 DECEMBER OF 1952.

19 Q. BY THE WAY, I WANT TO ASK AS TO READER'S DIGEST,
20 DID IT TAKE CIGARETTE ADVERTISING?

21 A. IN THOSE DAYS, IT TOOK NO ADVERTISING
22 WHATSOEVER. THESE DAYS, IT DOES TAKE ADVERTISING, BUT NOT
23 CIGARETTE ADVERTISING.

24 Q. AND IN THE EARLY 1950S, THE ADVERTISING THAT A
25 MEDIA TAKES, SUCH AS MAGAZINE, CAN IT HAVE AN INFLUENCE ON
26 THE CONTENT OF THE PUBLICATION ITSELF?

27 MR. OHLEMEYER: OBJECTION, YOUR HONOR. LACK OF
28 FOUNDATION.

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0108

1 THE COURT: CAN I HEAR THAT BACK AGAIN.
2 (RECORD READ).

3 THE COURT: I DON'T EVEN UNDERSTAND THE
4 QUESTION.
5 MS. CHABER: IT'S A TERRIBLE QUESTION.
6 THE COURT: OKAY.
7 MS. CHABER: Q. DR. POLLAY, WHEN A COMPANY
8 ADVERTISES IN A MAGAZINE OR A NEWSPAPER, IN YOUR EXPERIENCE
9 AND TRAINING, DOES THE FACT OF THE AMOUNT OF EXPENDITURE
10 TOWARD THAT ADVERTISING HAVE ANY EFFECT ON THE ABILITY OF
11 THE ADVERTISER TO DICTATE OR IN SOME WAY INFLUENCE THE
12 CONTENT?
13 MR. OHLEMEYER: OBJECTION, YOUR HONOR. LACK OF
14 FOUNDATION, ARGUMENTATIVE AND AGAIN 801(A).
15 THE COURT: THERE'S NO FOUNDATION IN THIS RECORD
16 AT THIS MOMENT FOR THE QUESTION. I'LL SUSTAIN. AND THE
17 OTHER GROUNDS, LET'S WAIT AND SEE WHERE WE GO.
18 MS. CHABER: OKAY.
19 Q. DR. POLLAY, IS ADVERTISING EXPENDITURE AND
20 CONTENT OF MEDIA SOMETHING THAT YOU HAVE STUDIED?
21 A. YES, AND I'VE ALSO REVIEWED PAPERS BY OTHERS WHO
22 HAVE STUDIED THE SAME TOPIC.
23 Q. IS THAT SOMETHING THAT IS INTUITIVE OR DO YOU
24 BELIEVE THAT YOUR SKILL, TRAINING AND EXPERIENCE GIVES YOU
25 AN ADDED PERSPECTIVE ON WHETHER OR NOT THAT EXPENDITURE OF
26 ADVERTISING CAN INFLUENCE CONTENT?
27 A. I THINK THE TRAINING GIVES YOU INSIGHT AS TO THE
28 DYNAMICS OF HOW IT COMES ABOUT. BUT I THINK THE BASIC
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0109

1 PATTERN OF WHAT COMES ABOUT IS CONSISTENT WITH WHAT MANY
2 PEOPLE MIGHT SUPPOSE.
3 Q. OKAY. IN TERMS OF HOW IT COMES ABOUT THEN, HOW
4 CAN THE EXPENDITURE OF ADVERTISING DOLLARS AFFECT THE
5 CONTENT OF A PUBLICATION?
6 MR. OHLEMEYER: SAME OBJECTION.
7 THE COURT: FIRST OF ALL. DO YOU UNDERSTAND THE
8 QUESTION?
9 THE WITNESS: YES, I HAVE AN UNDERSTANDING.
10 WHETHER IT'S HER UNDERSTANDING --
11 THE COURT: I DON'T FULLY UNDERSTAND THE
12 QUESTION. IF YOU WANT TO HAVE A SIDEBAR WITH ME -- I'M
13 GOING TO SUSTAIN, BECAUSE I DON'T UNDERSTAND THE QUESTION.
14 BUT IF YOU WANT TO HAVE A SIDEBAR IN WHICH YOU CAN EXPLAIN
15 IT TO ME, THAT'S FINE. IF YOU WANT TO REPHRASE IT OR GO AT
16 IT A DIFFERENT WAY, THAT'S FINE.
17 MS. CHABER: YOU KNOW WHAT, I WILL GO AT IT A
18 DIFFERENT WAY RATHER THAN BELABOR IT.
19 THE COURT: OKAY.
20 MS. CHABER: Q. WE WERE TALKING ABOUT THIS
21 HEALTH SCARE AND THE PUBLICATION IN READER'S DIGEST. WERE
22 THERE OTHER PUBLICATIONS OR INFORMATION AT THAT TIME IN THE
23 GENERAL MEDIA THAT DISCUSSED THE SERIOUSNESS OR HAZARDS OF
24 SMOKING CIGARETTES?
25 A. SOME. NOT TOO MUCH. THE ARTICLE IN QUESTION IN
26 THE READER'S DIGEST HAD BEEN EARLIER PRINTED IN A MAGAZINE
27 CALLED THE CHRISTIAN HERALD. THERE WERE OCCASIONAL STORIES
28 IN SOME OF THE HIGHER PROFILED NEWS OUTLETS, LIKE THE NEW
JUDITH ANN OSSA, CSR NO. 2310

0110

1 YORK TIMES. BUT BEYOND THAT, IT WASN'T A FREQUENTLY OR
2 HIGHLY PROMINENTLY COVERED STORY.
3 Q. INITIALLY WERE THERE SOME, YOU KNOW, FRONT PAGE
4 OR HEADLINE NEWS ABOUT EVIDENCE OF CANCER FROM CIGARETTES AT
5 THIS TIME?

6 A. I DON'T REMEMBER WHETHER THERE WAS FRONT PAGE
7 HEADLINES IN THOSE DAYS, IN '52, AS I SAY, I THINK THE MOST
8 PROMINENT HEADLINE WAS THE READER'S DIGEST HEADLINE FOR ITS
9 STORY. YOU DIDN'T EVEN HAVE TO READ THE STORY TO GET THE
10 POINT OF IT. IT WAS A GOOD HEADLINE IN THAT RESPECT. BUT
11 IT WAS ENOUGH TO BE A PROBLEM FOR THE INDUSTRY. THERE WAS
12 ENOUGH TO CAUSE SOME PEOPLE TO BE LEERY.

13 Q. AND WAS THERE ANY ACTION TAKEN BY MEMBERS OF THE
14 CIGARETTE INDUSTRY WITH RESPECT TO THIS POTENTIAL OF A
15 HEALTH SCARE?

16 A. YES. SEVERAL TYPES OF ACTIONS, SOME OF WHICH WE
17 HAVE DISCUSSED ALREADY, LIKE BEGINNING PRODUCT DEVELOPMENT
18 FOR FILTERS, AND CAMPAIGNS TO LAUNCH FILTER PRODUCTS, BUT
19 ALSO COMING TOGETHER TO FORM AN ORGANIZATION TO SPONSOR A
20 PUBLIC RELATIONS EFFORT.

21 Q. AND CAN YOU DESCRIBE WHAT YOU MEAN BY THAT?

22 A. IN DECEMBER OF '53, THE INDUSTRY MET IN THE PLAZA
23 HOTEL AND CAME TO AN AGREEMENT WITH THE HILL AND KNOWLTON
24 PUBLIC RELATIONS FIRM TO BEGIN AN EFFORT TO DEAL WITH THIS
25 HEALTH SCARE, TO CALM THE TROUBLED WATERS THROUGH USING THE
26 TOOLS OF PUBLIC RELATIONS, BEGINNING FIRST WITH A MAJOR
27 ADVERTISING PUSH CALLED "THE FRANK STATEMENT" THAT WAS
28 PUBLISHED JUST AFTER THOSE CHRISTMAS HOLIDAYS.

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0111

1 Q. AND THE REFERENCE TO THE FRANK STATEMENT, WHAT IS
2 THAT?

3 A. IT'S THE HEADLINE TO THE AD THAT WAS RUN IN ALL
4 THE MAJOR NATIONAL NEWSPAPERS -- EXCUSE ME -- MAJOR
5 NEWSPAPERS ACROSS THE NATION; THAT IS, ALL THE MAJOR
6 METROPOLITAN NEWSPAPERS. I THINK THERE WAS SOMETHING LIKE
7 448 DIFFERENT NEWSPAPERS OR SOMETHING AROUND THAT ORDER OF
8 MAGNITUDE. THEY SPENT A QUARTER OF A MILLION DOLLARS IN
9 ROUND NUMBERS TOWARD THAT PURPOSE ON THAT ONE DAY.

10 Q. AND WHO WAS HILL AND KNOWLTON?

11 A. HILL AND KNOWLTON WAS THE LARGEST PUBLIC
12 RELATIONS FIRM IN THE NATION OPERATING OUT OF NEW YORK AND
13 REPRESENTING PEOPLE LIKE THE STEEL INDUSTRY AND OTHER LARGE
14 CORPORATE CLIENTS.

15 Q. HAVE YOU HAD A PARTICULAR INTEREST IN THE
16 ACTIVITIES OF HILL AND KNOWLTON WITH RESPECT TO THE
17 CIGARETTE INDUSTRY'S RESPONSE TO THE HEALTH SCARE OF THE
18 1950S?

19 A. YES, I HAVE. I HAVE HAD UNIQUE ACCESS TO SOME OF
20 THE DOCUMENTS.

21 Q. WHAT TYPES OF DOCUMENTS ARE YOU TALKING ABOUT?

22 A. INTERNAL MEMORANDA, INTERNAL TO THE OPERATIONS OF
23 KNOWLTON, ACTIVITIES ON BEHALF OF WHAT BECAME KNOWN AS TIRC,
24 T-I-R-C, FOR THE TOBACCO INDUSTRIAL RESEARCH COMMITTEE.

25 Q. WOULD YOU MIND -- THERE IS A PAD BEHIND YOU --
26 WRITING UP THOSE INITIALS. THEY'RE GOING TO COME UP AGAIN
27 IN THE COURSE OF THIS DISCUSSION.

28 A. (WRITING ON BOARD)

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0112

1 SO THE ACRONYM STANDS FOR TOBACCO INDUSTRY RESEARCH
2 COMMITTEE.

3 Q. WHEN YOU SAY YOU HAD SOME UNIQUE ACCESS TO
4 INTERNAL DOCUMENTS OF HILL AND KNOWLTON, WHAT ARE YOU
5 REFERRING TO?

6 A. JOHN HILL, THE PARTNER OF HILL AND KNOWLTON, THE
7 FIRM THAT BEARS HIS NAME, LEFT PERSONAL PAPERS TO THE
8 ARCHIVES AT THE STATE HISTORICAL SOCIETY OF WISCONSIN, AND I

9 WAS THE FIRST PERSON TO HAVE ACCESS TO THOSE PAPERS, AS FAR
10 AS I KNOW.

11 Q. AND CAN YOU EXPLAIN TO US HOW THAT CAME ABOUT.

12 A. IN THE COURSE OF TESTIFYING IN A TRIAL MORE THAN
13 A DECADE AGO, I CAME ACROSS THE NAME OF JOHN W. HILL AND THE
14 ACTIVITIES OF TIRC AND THE NAME RANG A BELL. AND I
15 CONSULTED A REFERENCE BOOK THAT ACTUALLY I HAD BEEN
16 RESPONSIBLE FOR EARLIER ON INFORMATION SOURCES FOR THE
17 ADVERTISING HISTORY.

18 SO I LOOKED UP IN THE INDEX JOHN W. HILL, AND
19 THERE WAS A REFERENCE TO THESE ARCHIVES IN WISCONSIN AND IT
20 SAID THAT THESE PAPERS ARE THERE, BUT THEY WERE UNDER LOCK
21 AND SEAL UNTIL 1989, IF I REMEMBER MY DATES CORRECTLY. AND
22 IT WAS VIRTUALLY THAT POINT IN TIME WHEN I UNDERTOOK TO DO
23 THIS. AND SO I SCHEDULED MYSELF TO GO TO THE ARCHIVES AND
24 LOOK THROUGH THOSE PAPERS. AND IN HIS PERSONAL PAPERS, HE
25 HAD INCLUDED PAPERS FOR THIS TOBACCO INDUSTRY RESEARCH
26 COMMITTEE.

27 Q. OKAY. AND DID YOU REVIEW THOSE PAPERS?

28 A. I DID. I REVIEWED -- I SPENT SEVERAL DAYS THERE
JUDITH ANN OSSA, CSR NO. 2310

0113

1 REVIEWING THE PAPERS AND IN ADDITION PHOTOCOPIED MANY OF
2 THEM AND TOOK THEM BACK TO MY OWN OFFICE WITH ME AND
3 PROCEEDED TO WRITE UP AN ARTICLE BASED UPON THOSE PAPERS.

4 Q. AND THESE ARE PAPERS FROM THE 1950S?

5 A. YES. PRIMARILY -- THERE MAY HAVE BEEN ONE OR TWO
6 THAT CROSSED THE DECADE INTO THE '60S, BUT PRIMARILY THEY
7 WERE THE EARLY DAYS OF THIS ACTIVITY, THE EARLY 1950S; THAT
8 IS, FROM DECEMBER OF '53 THROUGH THE BALANCE OF THAT DECADE.

9 Q. OKAY. AND I'VE HANDED YOU A BINDER MARKED
10 EXHIBIT 12.

11 AND I BELIEVE, YOUR HONOR, YOU HAVE THAT AS
12 WELL.

13 AND THE SUBEXHIBIT NUMBERS GO FROM 12-1 TO
14 12-32. ARE THESE DOCUMENTS WHICH WERE CONTAINED WITHIN THE
15 ARCHIVES OF MR. JOHN HILL?

16 A. THEY ARE.

17 Q. AND WHAT WAS THE ROLE THAT JOHN HILL FROM HILL
18 AND KNOWLTON PLAYED IN THE CIGARETTE INDUSTRY'S DEALING WITH
19 THE HEALTH SCARE?

20 A. HE AND SOME OF HIS OTHER SENIOR PLAYERS MET WITH
21 THE CHIEF EXECUTIVE OFFICERS OF THE INDUSTRY AND THEN
22 SUBSEQUENTLY ALSO CONSULTED WITH CHIEF EXECUTIVE OFFICES OF
23 THEIR ADVERTISING AGENCIES, AND AFTER THIS PROCESS OF
24 CONSULTATION DEVELOPED PLANS, EXECUTED PLANS AND REPORTED
25 BACK TO THE TIRC. TIRC WAS THE ORGANIZING BODY. SO IT WAS
26 THE EXECUTIVES OF THE INDUSTRY.

27 IN FACT, IN THE FRANK STATEMENT AD, YOU SEE THE
28 SIGNATURES OF ALL THE SIGNING COMPANIES.

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0114

1 MS. CHABER: OKAY. AND YOUR HONOR, THE EXHIBIT
2 BINDER 11 -- I WILL GET IT FOR YOU. I JUST WANT TO MAKE
3 SURE. BINDER 11.

4 Q. AND LET ME HAND IT TO YOU. EXHIBIT 11-1, IS THAT
5 A VERSION OF THE FRANK STATEMENT?

6 A. THIS IS A DRAFT VERSION. THIS IS THE DRAFT AS OF
7 DECEMBER 22ND. OVER THAT CHRISTMAS BREAK, THERE WERE
8 SEVERAL MEETINGS TO REVISE THIS. SO IT WAS THAT THE FINAL
9 VERSION IS SLIGHTLY DIFFERENT THAN WHAT APPEARS HERE.

10 Q. OKAY. AND IS THE FRANK STATEMENT CONTAINED
11 WITHIN BINDER 12 THAT I'VE GIVEN YOU?

12 A. BINDER 12?
13 Q. THE HILL AND KNOWLTON PAPERS.
14 A. I DON'T SEE IT.
15 Q. I SEE THE PROBLEM. GOING BACK TO 11-1. DO YOU
16 SEE THAT THERE IS MORE THAN ONE DRAFT OF THE FRANK
17 STATEMENT?
18 A. YES. THERE ARE DRAFTS FOR THE 22ND, AGAIN ON THE
19 28TH OF DECEMBER THAT'S QUITE MARKED UP, ANOTHER VERSION
20 WHICH I GUESS IS A CLEANED-UP VERSION ALSO DATED THE 28TH
21 WITH A NOTE THAT SAYS "TO START MONDAY, JANUARY 4TH." AND
22 THEN THERE'S YET ANOTHER VERSION THAT IS DATED JANUARY 4.
23 Q. OKAY. AND THAT SECOND OR RATHER THE LAST VERSION
24 IS A COPY OF THE ADVERTISEMENT THAT WAS SCHEDULED TO APPEAR
25 ON JANUARY 4TH, 1954?
26 A. IT IS THE COPY THAT APPEARED IN THE
27 ADVERTISEMENT. THE ADVERTISEMENT ITSELF HAD A SLIGHTLY
28 DIFFERENT LAYOUT. IT HAD A BIG HEADLINE THAT SAID "FRANK
JUDITH ANN OSSA, CSR NO. 2310

0115

1 STATEMENT" AND SO ON, BUT THIS IS THE TEXT, AS I UNDERSTAND
2 IT.
3 Q. THE MEMBERS, THE EXECUTIVES OF THE VARIOUS
4 CIGARETTE COMPANIES, WERE THEY INVOLVED IN THE DRAFTING AND
5 FINAL VERSION OF THE ADVERTISEMENT THAT WAS THEN PLACED ON
6 JANUARY 4TH, 1954 CALLED "FRANK STATEMENT TO CIGARETTE
7 SMOKERS"?
8 MR. OHLEMEYER: OBJECTION, YOUR HONOR. LACK OF
9 FOUNDATION.
10 THE COURT: SUSTAINED.
11 MS. CHABER: IF YOU SEE COUNSEL STAND UP, JUST
12 DON'T ANSWER THE QUESTION, PLEASE. YOU DID IT RIGHT. BUT
13 JUST KEEP YOUR EYE ON HIM. SO IF HE STANDS UP, I DON'T NEED
14 TO INTERRUPT YOU.
15 MS. CHABER: Q. IS THERE EVIDENCE AND
16 INFORMATION THAT YOU HAVE RELIED ON THAT INDICATE THAT THE
17 EXECUTIVES OF THE TOBACCO INDUSTRY HAD HIRED HILL AND
18 KNOWLTON TO PREPARE A PUBLIC RELATIONS CAMPAIGN WITH RESPECT
19 TO THE HEALTH SCARE?
20 A. YES. AND NOT JUST ANY EXECUTIVES BUT THE CHIEF
21 EXECUTIVES.
22 Q. AND DID IN FACT THE CHIEF EXECUTIVES' NAMES
23 APPEAR IN THE NEWSPAPERS SIGNING OFF ON THE FRANK STATEMENT
24 THAT WAS PUBLISHED?
25 A. YES, THEY DID.
26 Q. AND IN REVIEWING MR. HILL'S PAPERS WITH RESPECT
27 TO THE ESTABLISHMENT OF THE FRANK STATEMENT AND ULTIMATELY
28 THE TOBACCO INDUSTRY RESEARCH COMMITTEE, IS THERE EVIDENCE
JUDITH ANN OSSA, CSR NO. 2310

0116

1 THAT YOU HAVE RELIED ON THAT THE CIGARETTE COMPANY
2 EXECUTIVES, CHIEF EXECUTIVES WERE INVOLVED IN THE ACTUAL
3 PREPARATION OF THE FRANK STATEMENT?
4 A. I BELIEVE THEY WERE INTIMATELY INVOLVED.
5 Q. AND WHEN YOU SAY "INTIMATELY INVOLVED," WHAT DO
6 YOU MEAN?
7 A. THAT THEY SAW AND COMMENTED UPON DRAFTS AND
8 APPROVED THE FINAL VERSION AS IT APPEARED.
9 MS. CHABER: YOUR HONOR, I WOULD MOVE THE FRANK
10 STATEMENT AND THE DRAFTS INTO EVIDENCE.
11 THE COURT: WHAT NUMBER? I CAN ONLY DO THIS BY
12 NUMBER.
13 MS. CHABER: EXHIBIT 11-1.
14 THE COURT: 11-1. IS THERE ANY OBJECTION TO

15 PLAINTIFF'S 11-1?
16 MR. OHLEMEYER: YOUR HONOR, I HAVE NO OBJECTION
17 TO WHAT HAS BEEN DESCRIBED AS THE TEXT OF THE FRANK
18 STATEMENT THAT WAS ACTUALLY PUBLISHED IN A DIFFERENT FORM IN
19 THE ADVERTISEMENT, BUT I DO OBJECT TO THE DRAFTS ON LACK OF
20 FOUNDATION AND 352 GROUNDS.
21 THE COURT: WELL, I CAN'T TELL FROM THE
22 TESTIMONY WHAT EXHIBIT NUMBER IT REFERENCED. IT WAS TOO
23 VAGUE FOR ME. YOU'RE GOING TO HAVE TO TAKE IT UP WITH THE
24 INDIVIDUAL DOCUMENT IN MIND. AND IF HE MAKES AN OBJECTION
25 FOR LACK OF FOUNDATION, I'LL RULE ON IT AT THE TIME.
26 WE'RE GOING TO HAVE TO DO THIS APPARENTLY
27 DOCUMENT BY DOCUMENT, BECAUSE IT ISN'T CLEAR TO ME WHAT YOUR
28 FOUNDATION HAS BEEN FOR THESE DOCUMENTS. AND I'LL ENTERTAIN
JUDITH ANN OSSA, CSR NO. 2310

0117

1 OBJECTIONS, IF YOU WANT TO MAKE THEM AT THIS TIME, SO WE CAN
2 DECIDE WHETHER THEY ARE ADMISSIBLE OR NOT. I MEAN, IF YOU
3 WANT TO MAKE THEM. I'M NOT ENCOURAGING OBJECTIONS. IF YOU
4 WANT TO MAKE THEM, LET'S MAKE THEM NOW SO WE CAN GET THIS
5 RESOLVED.
6 MS. CHABER: Q. IS THERE EVIDENCE WITH RESPECT
7 TO THE DRAFTS OF THE FRANK STATEMENTS, WHICH WOULD BE THE
8 FIRST 1, 2, 3, 4, 5, 6 PAGES OF PLAINTIFF'S EXHIBIT 11-1?
9 THE COURT: THE FIRST --
10 THE WITNESS: EIGHT PAGES, I BELIEVE.
11 THE COURT: YOU KNOW, I DON'T KNOW IF YOUR
12 DOCUMENT COMPORTS WITH MIND. I DON'T SEE THE LOGIC OF THE
13 QUESTION, ACCORDING TO THE DOCUMENT THAT I HAVE. ANYWAY,
14 THERE HASN'T BEEN ANY TESTIMONY THAT THOSE PAGES WERE
15 ANYTHING YET. YOU ARE GOING TO HAVE TO START ALL OVER AND
16 LAY A FOUNDATION.
17 MS. CHABER: OKAY.
18 THE COURT: I DON'T SEE THE REFERENCE TO THE SIX
19 PAGES.
20 MS. CHABER: OKAY.
21 THE COURT: OKAY. THE TESTIMONY HAS GOT TO COME
22 FROM THE WITNESS, NOT FROM YOU. SO YOU NEED TO PROCEED.
23 MS. CHABER: Q. DR. POLLAY, IN PLAINTIFF'S
24 EXHIBIT 11-1, WHAT IS THAT?
25 A. A SERIES OF DRAFTS BEGINNING IN DECEMBER OF THE
26 FRANK STATEMENT, BEGINNING ON DECEMBER 22ND, ANOTHER DRAFT
27 DATED DECEMBER 28TH, YET ANOTHER DRAFT DATED DECEMBER 28TH,
28 AND THEN A FINAL CLEAN VERSION OF WHAT WAS PUBLISHED ON
JUDITH ANN OSSA, CSR NO. 2310

0118

1 JANUARY 4, DATED JANUARY 4.
2 Q. AND THE NUMBER OF PAGES IN EACH DRAFT? THE
3 DECEMBER 22ND DRAFT HAS HOW MANY PAGES?
4 A. TWO PAGES. THE DECEMBER 28TH DRAFT HAS THREE,
5 THE NEXT DECEMBER 28TH DRAFT HAS THREE PAGES AND THEN THE
6 FINAL DRAFT ALSO HAS THREE PAGES.
7 Q. OKAY. AND THE FINAL DRAFT IS WHAT WAS ADVERTISED
8 OR WHAT WAS POSTED IN ALL THE NEWSPAPERS UNDER THE HEADING
9 "A FRANK STATEMENT TO CIGARETTE SMOKERS"?
10 A. I BELIEVE SO. BUT AGAIN, THE TEXT ONLY, IT'S NOT
11 LAID OUT AS THE AD WAS LAID OUT. SO THE AD MIGHT HAVE GIVEN
12 DIFFERENT EMPHASIS IN DIFFERENT COMPONENT PARTS OF THIS.
13 Q. AND IN REVIEWING ALL OF THE MATERIALS IN MR. JOHN
14 HILL'S FILE AND IN REVIEWING INTERNAL DOCUMENTS OF CIGARETTE
15 COMPANIES, WERE THE CIGARETTE COMPANIES DIRECTLY INVOLVED IN
16 THE CREATION AND DRAFTING OF THE FRANK STATEMENT TO
17 CIGARETTE SMOKERS AS IT APPEARS IN EXHIBIT 11-1?

18 A. YES. PRIMARILY BY MEETING WITH THE PRINCIPALS,
19 JOHN HILL, TO PROVIDE THEM THE BRIEFING AND THE BEGINNING,
20 THEN BEING INVOLVED IN THE REVISION AND REWRITING PROCESSES
21 TO GET TO THE FINAL DRAFT.

22 Q. OKAY. AND ARE THERE DOCUMENTS CONTAINED WITHIN
23 PLAINTIFF'S EXHIBIT 12 THAT INDICATE THE CIGARETTE COMPANIES
24 WERE ADVISED OF HILL & KNOWLTON'S PUBLIC RELATIONS PROGRAM
25 AND SUGGESTIONS?

26 A. YES. IN 12, YES, THERE ARE. THERE ARE MANY,
27 MANY DOCUMENTS OF THAT NATURE OFFERING SUGGESTIONS.

28 Q. OKAY. AND DO THOSE DOCUMENTS LIKEWISE APPEAR IN
JUDITH ANN OSSA, CSR NO. 2310

0119

1 VARIOUS INTERNAL DOCUMENTS OF CIGARETTE COMPANIES?

2 A. THAT'S MY UNDERSTANDING, YES.

3 MS. CHABER: AT THIS TIME, YOUR HONOR, I WOULD
4 MOVE PLAINTIFF'S EXHIBIT 11-1 INTO EVIDENCE.

5 THE COURT: ANY OBJECTION?

6 MR. OHLEMEYER: THE SAME OBJECTION AS TO THE
7 DRAFTS. I HAVE NO OBJECTION AS TO WHAT'S BEEN DESCRIBED AS
8 THE JANUARY 4 STATEMENT. IF YOUR HONOR MIGHT, I'D ASK A
9 COUPLE OF QUESTIONS, FOUNDATIONAL OF THE OBJECTION.

10 THE COURT: YES, YOU MAY DO THAT, BUT LET ME
11 BEFORE YOU DO THAT JUST MEET WITH YOU FOR 30 SECONDS. AND I
12 WILL ALLOW YOU TO DO THAT AFTER THAT.

13 (COURT AND COUNSEL CONFER OUTSIDE

14 THE PRESENCE OF THE JURY)

15 THE COURT: OKAY. MR. OHLEMEYER.

16 MR. OHLEMEYER: THANK YOU, YOUR HONOR.

17

18 VOIR DIRE EXAMINATION

19 BY MR. OHLEMEYER: Q. DR. POLLAY, MY NAME IS
20 BILL OHLEMEYER. WE HAVE NOT MET. I REPRESENT PHILIP
21 MORRIS. I WANT TO ASK YOU ABOUT -- I'D LIKE TO ASK A COUPLE
22 OF QUESTIONS BRIEFLY ABOUT THESE THREE DRAFTS, THE DECEMBER
23 22ND, THE DECEMBER 28 AND THE SECOND DECEMBER 28; RIGHT?

24 A. YES. THOSE ARE THE DATES THAT APPEAR ON THE
25 COPIES I HAVE.

26 Q. DO YOU KNOW WHO SPECIFICALLY WAS PRESENT AT ANY
27 PARTICULAR MEETING WHERE ANY OF THESE THREE SPECIFIC DRAFTS
28 WERE DISCUSSED?

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0120

1 A. NOT OFF THE TOP OF MY HEAD. I'D HAVE TO GO
2 THROUGH THE VARIOUS DOCUMENTS WE HAVE HERE.

3 Q. DO YOU KNOW OR CAN YOU TELL US WHO SUGGESTED --
4 WHO SPECIFICALLY DISCUSSED ANY OF THESE CHANGES THAT ARE
5 MADE ON ANY OF THESE THREE DRAFTS?

6 A. NO. I DON'T RECALL.

7 Q. AND DO YOU KNOW WITH ANY REASONABLE CERTAINTY
8 WHOSE HANDWRITING OR WHOSE MARKINGS THERE ARE ON ANY THESE
9 THREE SPECIFIC DRAFTS?

10 A. NO, I DON'T RECOGNIZE THE HANDWRITING.

11 MR. OHLEMEYER: THAT IS ALL I HAVE, YOUR HONOR.
12 THANK YOU. SAME OBJECTION.

13 THE COURT: LET ME ASK YOU THIS. WERE THERE ANY
14 PORTIONS OF THIS DOCUMENT YOU DID NOT OBJECT TO?

15 MR. OHLEMEYER: THE THREE DRAFTS. THE JANUARY
16 4TH VERSION, I HAVE NO OBJECTION.

17 THE COURT: THE LAST THREE PAGES?

18 MR. OHLEMEYER: CORRECT.

19 THE COURT: OKAY. AND THE LEGAL GROUNDS OF THE
20 OBJECTION ARE?

21 MR. OHLEMEYER: LACK OF FOUNDATION, RELEVANCE
22 AND SECTION 352.

23 THE COURT: I'M GOING TO SUSTAIN ON LACK OF
24 FOUNDATION AND ON 352, HAVING DONE THE WEIGHING, BUT I WILL
25 LET IN THE LAST THREE PAGES, WHICH GIVES RISE TO THE ISSUE
26 NOW OF HOW ARE WE GOING TO HANDLE THIS PROBLEM? WE NEED TO
27 DEAL WITH IT NOW, BECAUSE IT MAY ARISE LATER. WE HAVE A
28 DOCUMENT THAT HAS BEEN MARKED AND SOME PART OF IT IS COMING
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1 INTO EVIDENCE. WE NEED TO GET A PROCEDURE GOING HERE NOW
2 THAT WE'RE GOING TO FOLLOW FOR THE REST OF THE CASE.

3 MS. CHABER: SURE, YOUR HONOR. AND I ASSUME
4 THAT FOR THE PURPOSES OF THOSE PORTIONS OF THE DOCUMENT THAT
5 ARE GOING INTO EVIDENCE, THEY CAN BE SHOWN AND THAT THE
6 COURT'S RULING WITH RESPECT TO THE OTHER ONES IS WITHOUT
7 PREJUDICE TO THERE BEING OTHER FOUNDATION OBVIOUSLY LAID?

8 THE COURT: YES, IT ALWAYS IS. THAT GOES
9 WITHOUT SAYING. LET ME JUST SUGGEST THIS TO YOU. I THINK
10 THAT WE REALLY OUGHT TO MARK THEM SEPARATELY, BECAUSE
11 OTHERWISE IT'S GOING TO BE A TERRIBLE JOB, WHEN THE JURY
12 RETIRES TO DELIBERATE, TO FIGURE OUT WHAT PORTIONS OF WHAT
13 DOCUMENTS GOT INTO EVIDENCE AND WHAT DIDN'T.

14 I THINK WE BETTER TAKE THE TIME TO DO IT
15 CAREFULLY NOW OR WE'LL GET LOST.

16 MS. CHABER: CERTAINLY. WE COULD CERTAINLY
17 SUBMARK THEM, YOUR HONOR, 11-1-A, 11-1-B, 11-1-C AND 11-1-D.
18 (DOCUMENTS MORE PARTICULARLY
19 DESCRIBED IN THE INDEX MARKED
20 FOR IDENTIFICATION PLAINTIFF'S
21 EXHIBIT #S 11-1-A THROUGH 11-1-D)

22 THE COURT: DO YOU HAVE ANOTHER COPY OF THE LAST
23 THREE PAGES OF 11-1 THAT WE COULD MARK SEPARATELY RIGHT
24 NOW?

25 MR. OHLEMEYER: YOU CAN HAVE THIS ONE.

26 THE COURT: IF YOU HAVE ONE FOR ME. DO YOU HAVE
27 TWO EXTRA COPIES? I'M SURE THE LAWYERS WILL GET USED TO
28 THIS PROCEDURE AND WE WON'T CONTINUE TO HAVE THESE KINDS OF
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1 PROBLEMS. WE'RE JUST GETTING USED TO A SYSTEM AND I THINK
2 WE OUGHT TO DO HERE EXACTLY WHAT YOU DID WITH THE LAST
3 DOCUMENT.

4 MS. CHABER: YES. AND WE HAVE SINCE
5 SUBSEQUENTLY SUBSTITUTED THAT ONE.

6 THE COURT: THAT IS WHAT WE OUGHT TO DO HERE.

7 MS. CHABER: FOR THE TIME BEING THEN, WE COULD
8 MARK THE 11-1-D, WHICH IS THE ONE THE COURT IS ALLOWING INTO
9 EVIDENCE, THERE BEING NO OBJECTION.

10 THE COURT: OKAY. THAT'S THE ONE THAT HAS THE
11 DATE JANUARY 4TH, 1954?

12 MS. CHABER: THAT SAYS "COPY ADVERTISEMENT
13 SCHEDULED FOR JANUARY 4, 1954."

14 THE COURT: FOR THE RECORD, THAT'S GOING TO BE
15 MARKED NOW. AND I TAKE IT YOU HAVE NO OBJECTION TO THAT
16 GOING INTO EVIDENCE, MR. OHLEMEYER?

17 MR. OHLEMEYER: NO OBJECTION, YOUR HONOR.

18 THE COURT: 11-1-D IS RECEIVED.

19 MS. CHABER: THE COURT WANTS A SECOND COPY?

20 THE COURT: I WOULD LIKE A SECOND COPY FOR
21 MYSELF.

22 MS. CHABER: I HAVE GOT THEM HERE.

23 THE COURT: IF YOU GIVE THEM TO VERA, WE'LL TAKE

24 CARE OF IT. THANK YOU VERY MUCH.
25 THE CLERK: PLAINTIFF'S EXHIBIT 11-1-D MARKED
26 FOR IDENTIFICATION AND MOVED INTO EVIDENCE.
27 THE COURT: AND RECEIVED.
28 (DOCUMENT MORE PARTICULARLY
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0123
1 DESCRIBED IN THE INDEX RECEIVED
2 IN EVIDENCE AS PLAINTIFF'S
3 EXHIBIT # 11-1-D)
4
5 DIRECT EXAMINATION (RESUMED)
6 BY MS. CHABER: Q. AND DR. POLLAY, 11-1-D THAT
7 YOU HAVE BEEN HANDED, IS THAT THE ADVERTISEMENT COPY THAT WE
8 WERE REFERRING TO OF THE FRANK STATEMENT?
9 A. YES, IT IS.
10 Q. AND WHAT DID THE FRANK STATEMENT PURPORT TO SAY
11 THAT THE CIGARETTE COMPANIES WERE GOING TO DO?
12 MR. OHLEMEYER: YOUR HONOR, I OBJECT TO WHAT IT
13 PURPORTED TO SAY. I HAVE NO OBJECTION TO WHAT IT SAID,
14 ALTHOUGH THAT GETS INTO AN 801(A) AREA. MY OBJECTION IS TO
15 "WHAT DID IT PURPORT TO SAY?"
16 THE COURT: ALL RIGHT. YOU HAVE NO OBJECTION TO
17 HIS TESTIFYING AS TO WHAT IT DOES SAY. BUT JUST IF HE'S
18 GOING TO DEPART FROM THE WORDS, THEN YOU'RE OBJECTING?
19 MR. OHLEMEYER: RIGHT.
20 THE COURT: OKAY. THAT'S SUSTAINED. IF YOU ARE
21 GOING TO ASK HIM SOME QUESTIONS ABOUT THE SUBSTANCE OF IT,
22 THERE IS NO OBJECTION TO YOUR HAVING THE LANGUAGE PUT UP ON
23 THE BOARD.
24 MS. CHABER: Q. WHAT DOES THE FRANK STATEMENT
25 OR THE ADVERTISEMENT COPY OF THE FRANK STATEMENT SAY THAT
26 THE INDUSTRY IS GOING TO DO?
27 A. MAYBE I COULD JUST PARAPHRASE IT BEFORE WE GET
28 INTO THE DOCUMENT.
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1 Q. YES.
2 A. ESSENTIALLY IT SAYS THEY TOOK THE HEALTH ISSUE
3 VERY SERIOUSLY, THAT THERE IS A LOT OF CONTROVERSY AROUND
4 SOME OF THE HEALTH ISSUES, THAT THEY'LL SUPPORT RESEARCH
5 INTO THIS QUESTION AND THAT THEY'LL GET BACK TO THE PUBLIC
6 IF AND WHEN THERE'S ANYOWN INTO THE TOBACCO INSTITUTE
4 FOR LOBBYING AND ADVOCACY, ADVERTISING PURPOSES, AND THE
5 COUNCIL FOR TOBACCO RESEARCH, CTR, FOR THE GRANT AND FUNDING
6 OF RESEARCH.
7 Q. AND WITH RESPECT TO THE POSITION THAT THE TOBACCO
8 INSTITUTE IS TAKING WITH RESPECT TO THE HEALTH HAZARD TO
9 TOBACCO, THE HEALTH HAZARD OF TOBACCO TO INDIVIDUALS, WHAT
10 IS THEIR POSITION?
11 A. WELL, THE POSITION THAT HAHN IS COMMUNICATING IS
12 TO DEFEND THE INDUSTRY.
13 Q. AND WITH RESPECT TO MEDIA AND INFORMATION AS TO
14 WHAT THE MEDIA WAS REPORTING, DID THE TOBACCO INSTITUTE HAVE
15 VIEWPOINTS ON THE HEALTH ISSUES STATED IN MEDIA ARTICLES?
16 A. YES, THEY DID.
17 Q. AND DID THE TOBACCO INDUSTRY HAVE -- IS THERE
18 INFORMATION CONTAINED WITHIN THESE DOCUMENTS THAT THEY HAD
19 ACCESS TO THE MEDIA IN A DETAILED WAY?
20 A. WELL, I THINK THE NATURE OF THESE DOCUMENTS REFER
21 MORE TO THE TIRC, THAT IS THE ORGANIZATIONAL ENTITY THAT
22 PREDATED THE TOBACCO INSTITUTE. AND YES, THE TIRC HAD
23 INTIMATE ACCESS TO THE HIGHEST LEVELS OF THE MEDIA

24 ORGANIZATIONS.
25 Q. AND WHAT WOULD THAT MEAN WITH RESPECT TO THE
26 INFORMATION COMMUNICATED TO THE CONSUMER?
27 A. THAT IT WOULD CONTAIN THE INDUSTRY'S SPIN, AS WE
28 NOW SAY.

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1 Q. AND DID THAT INDEED HAPPEN?
2 A. YES, IT DID.
3 MS. CHABER: I THINK THIS IS PROBABLY A GOOD
4 TIME TO BREAK.
5 THE COURT: OKAY. YOU MAY STEP DOWN. YOU CAN
6 LEAVE THE DOCUMENTS THERE. WE'LL GET THEM.
7 OKAY. JURORS, DON'T DISCUSS THIS CASE WITH
8 ANYONE TONIGHT, DON'T LET ANYONE DISCUSS IT WITH YOU. DO
9 NOT FORM OR EXPRESS ANY OPINIONS ABOUT THE CASE.
10 I WAS GOING TO START TOMORROW AT 9:00, BUT I JUST
11 RECALLED THAT TATSUO I THINK IS GOING TO BE BACK TOMORROW,
12 AND I BETTER GIVE VERA A LITTLE TIME TO BRING TATSUO UP TO
13 WHERE WERE ARE ON THE RECORDING OF THE DOCUMENTS AND SO
14 FORTH.
15 WHAT I'M GOING TO DO IS HAVE YOU DO COME IN AT
16 9:30, BUT I WANT TO BE SURE THAT WE START PROMPTLY AT 9:30.
17 I DON'T WANT TO START 15 MINUTES OR A HALF HOUR LATE. SO
18 PLEASE, LET'S EVERYBODY BE SURE AND BE HERE PROMPTLY AT
19 9:30. HAVE A GOOD EVENING. SEE YOU AT 9:30 SHARP.
20 (THE JURY WAS DISMISSED AT 5:01 P.M.)
21 (THE FOLLOWING PROCEEDINGS WERE HELD IN
22 CHAMBERS, OUTSIDE THE PRESENCE OF THE JURY,
23 AT 5:05 P.M.)
24 THE COURT: WE'RE IN CHAMBERS OUTSIDE THE
25 PRESENCE OF THE JURY FOR TWO PURPOSES. FIRST OF ALL, I'VE
26 SHARED WITH COUNSEL BY SHOWING THEM TWO NOTES THAT I HAVE
27 RECEIVED FROM THE JURORS ASKING ABOUT MR. OHLEMEYER'S
28 OBJECTIONS AND WHAT 801(A) MEANS. AND I'VE ANSWERED THAT
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1 QUESTION CONSISTENTLY WITH THE INSTRUCTIONS I GAVE THEM AT
2 THE OUTSET.
3 I TAKE IT YOU BOTH WERE SATISFIED WITH THE
4 ANSWERS I GAVE THEM AND WE NEED NOT ADDRESS THAT WITH THE
5 JURY FURTHER?
6 MS. CHABER: YES.
7 MR. OHLEMEYER: CORRECT.
8 THE COURT: THE OTHER THING IS I THINK COUNSEL
9 HAVE MADE THE FOLLOWING STIPULATION, AND LET ME PUT IT ON
10 THE RECORD AND SEE IF I'VE GOT IT RIGHT. WITH RESPECT TO
11 THE PLAYING OF VIDEOTAPES OF TELEVISION ADS, ANY PARTY THAT
12 WISHES TO DO THAT IS NOT GOING TO OFFER THE VIDEOTAPE ITSELF
13 INTO EVIDENCE. BUT IF THE JURY WANTS TO HAVE IT PLAYED BACK
14 AND GIVES US A REQUEST TO THAT EFFECT, THEN WE'LL PLAY IT
15 BACK FOR THE JURY JUST AS IF WE WOULD READ BACK TESTIMONY,
16 IF THEY ASKED FOR THAT. AND OF COURSE COUNSEL CAN REFER TO
17 IT OR SHOW IT DURING THEIR CLOSING ARGUMENTS, IF THEY WISH
18 TO DO IT.
19 IS ALL OF THAT SO STIPULATED?
20 MS. CHABER: YES, YOUR HONOR. AND TO THE EXTENT
21 THAT IT -- BECAUSE IT WON'T BE IN EVIDENCE. SHOULD WE EVER
22 GET TO AN APPELLATE COURT LEVEL, THERE MAY BE SOME PROBLEM
23 BETWEEN THINGS THAT ARE MARKED FOR IDENTIFICATION, WHICH
24 USUALLY DOESN'T GO BEFORE THE APPELLATE COURT, IF THERE IS
25 AN ISSUE OF THE JURY ASKING FOR A PLAYBACK.
26 THE COURT: LOOK, I TAKE IT THE BOTTOM LINE IS

27 THAT FOR ANYBODY THAT WISHES TO MAKE AN APPELLATE RECORD,
28 YOU ARE GOING TO NEED TO INCLUDE THE VIDEOTAPE, EVEN THOUGH
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1 IT'S ONLY MARKED FOR IDENTIFICATION.
2 MR. OHLEMEYER: IT WENT IN WITHOUT OBJECTION.
3 THE COURT: THE POINT IS WITHOUT THE VIDEOTAPE,
4 THE APPELLATE COURT WOULDN'T KNOW WHAT IT IS THAT WENT IN
5 WITHOUT OBJECTION, BECAUSE IT'S NOT BEING RECORDED BY REASON
6 OF YOUR STIPULATION. SO IF ANYBODY WERE EVER TO ARGUE IN AN
7 APPELLATE COURT AS TO THE CONTENTS OF THE VIDEOTAPE, THERE
8 WOULD BE NO RECORD IN THE APPELLATE COURT TO SUBSTANTIATE
9 THE CLAIM AS TO WHAT WAS OR WASN'T STATED.
10 THEREFORE, YOU WILL NEED TO INCLUDE, I THINK, IN
11 YOUR RECORD IN THE APPELLATE COURT, ALTHOUGH THIS IS REALLY
12 BEYOND --
13 MS. CHABER: IT'S PREMATURE.
14 THE COURT: -- IT'S BEYOND MY PURVIEW AS A TRIAL
15 JUDGE TO TELL YOU WHAT SHOULD AND SHOULDN'T BE IN AN
16 APPELLATE RECORD. ALL I'M SAYING IS IF YOU WANT THE
17 APPELLATE RECORD TO INDICATE WHAT IT IS THAT WAS PLAYED, YOU
18 ARE GOING TO HAVE TO INCLUDE IN THE APPELLATE RECORD THE
19 VIDEOTAPE, EVEN THOUGH IT'S ONLY MARKED FOR IDENTIFICATION.
20 MS. CHABER: OKAY.
21 THE COURT: OKAY.
22 MR. OHLEMEYER: SO STIPULATED.
23 THE COURT: HAVE I CORRECTLY STATED A
24 STIPULATION THAT EACH OF YOU ENTERS INTO ON THE VIDEOTAPE?
25 MS. CHABER: YES.
26 MR. OHLEMEYER: YES, SIR.
27 THE COURT: WE CAN LET JUDITH GO HOME. HAVE A
28 GOOD EVENING, JUDITH.

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1 (THE PROCEEDINGS ADJOURNED AT 5:07 P.M.)
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